TABLE OF CONTENTS.

	Page
PETITION FOR WRITS OF CERTIORARI	1
Opinions and Orders Below	2
Jurisdiction	2
Statutes Involved	3
Questions Presented	3
Statement	4
Corporations Involved	5
Authority's Six-Year Effort to Purchase Power Company	6
Commonwealth's Illegal and Restrictive Conditions	6
Commonwealth Rejects Authority's Offer	7
The *Creech* Case	8
Commonwealth and the *Creech* Case	11
Public Interest Considerations	12
Order and Opinion of the SEC	17
Order and Opinion of the FPC	19
The Opinion Below	20
Reasons for Granting the Writs	21
Conclusion	23
BRIEF	25
I. The Opinions and Orders Below	25
II. Jurisdiction	26
III. Statement of the Case	26
IV. Specification of Errors to be Urged	26
V. Argument	26
1. The United States Court of Appeals for the Fourth Circuit, by affirming the said orders of the SEC and FPC, has decided questions of Federal law of general importance and substance relating to the construction and application of two statutes of the United States (The Public Utility Holding Company Act of 1935 and the Federal Power Act) and their relation to each other, which have not been but which should be settled by this Court	26

Page

A. The SEC has erred in holding that under Section 12 (d) of the Holding Company Act and Rule U-50 issued thereunder there was no compulsion upon it to weigh or give consideration to evidence bearing upon the interests of the public and consumers 28

B. The FPC erred in taking too narrow a view of its own jurisdiction in passing upon transactions under Section 203(a) of the Federal Power Act 33

C. The joint effect of the action of the two Commissions has been to squeeze out the interests of the public and consumers from consideration by either of them in passing upon transactions under both Section 12 (d) of the Holding Company Act and Section 203(a) of the Federal Power Act 37

2. The United States Court of Appeals for the Fourth Circuit has decided an important question of State law in a way directly in conflict with applicable State decisions, i. e., by deciding that the *Creech* case bars the Petitioner's right to purchase in this situation when that question was expressly left open by the Supreme Court of South Carolina, and in so doing has departed from the rule laid down by this Court that whenever possible Federal Courts should leave matters of State law to the decision of the State Courts 38

3. This matter is not moot, nor is the Authority's equitable position impaired by laches ... 41

VI. Conclusion 43

APPENDIX A ..... (SEC Brief in the Court below). Separately filed herewith.

APPENDIX B ..... (FPC Brief in the Court below). Separately filed herewith.

TABLE OF AUTHORITIES.

CASES CITED: Page

Chicago Junction Case, The, 264 U. S. 258 (1924) 27, 41, 42
Creech v. *South Carolina Public Service Authority,* 200 S. C. 127, 20 S. E. 2d 645 (1942).....3, 8, 9, 10, 11, ...17, 20, 21, 23, 28, 29, 32, 38, 39, 40, 41
Per Curiam order denying rehearing (unreported) 9, 10, 20, 21, 23, 38, 39, 40
Gilchrist v. *Interborough Rapid Transit Co.,* 279 U. S. 159 (1929) 38
Guadalupe-Blanco River Authority v. *City of San Antonio,* 145 Tex. 611, 200 S. W. 2d 989 (1947).... 39
Morgan v. *U. S.,* 298 U. S. 468 (1936) 27
Pacific Power & Light Company et al. v. *Federal Power Commission,* 111 F. 2d 1014 (1940)....20, 35, 36
Railroad Commission v. *Pullman Co.,* 312 U. S. 496 (1941) 38, 41
St. Joseph Stockyard Co. v. *U. S.,* 298 U. S. 38 (1936) 27
South Carolina Public Service Authority v. *Securities and Exchange Commission et al.,* 171 F. 2d 948 (1948) 1, 2, 9, 20, 23, 25, 40, 41
South Carolina Public Service Authority v. *Federal Power Commission et al.,* 171 F. 2d 948 (1948) 1, 2, 9, 20, 23, 25, 40, 41
Thompson v. *Magnolia Petroleum Company,* 309 U. S. 478 (1940) 38

STATUTES CITED:

Administrative Procedure Act (5 U. S. C. 1001 et seq.) Section 10 (5 U. S. C. Sec. 1009) 2, 3, 42

Code of Laws of South Carolina, 1942 .....5, 8, 10, 11, 39
Section 660 11
Section 668 11
Sections 8555-11 through 8555-24 .....5, 8, 10, 39

Federal Power Act (16 U. S. C. 791 et seq.) .....
.....2, 3, 4, 7, 18, 21, 23, 26, 30, 31, 32, 33, 35, 37, 42
Section 10(h) (16 U. S. C. 803(h)) 7
Section 203(a) (16 U. S. C. 824(b)(a) .....
.....4, 19, 31, 33, 35, 37

Page

Section 313 (16 U. S. C. 825(*l*)) 2, 42
Section 318 (16 U. S. C. 825 (*q*)) 18, 30, 31, 32

Public Utility Holding Company Act of 1935 (15 U. S. C. 79) 2, 3, 4, 6, 17, 18, 21, 23, 26, 28, 29, 30, 31, 37, 42
Section 11(b) (15 U. S. C. 79k(b)) 6
Section 11(e) (15 U. S. C. 79k(e)) 3, 4, 6, 28, 29
Section 12(d) (15 U. S. C. 79*l*(d)) .....
..... 3, 4, 6, 18, 28, 29, 31, 37
Section 24 (15 U. S. C. 79x) 2, 42
SEC Rule U-50 .....4, 18, 28, 29, 30

Title 28, United States Code
Section 1254 (28 U. S. C. 1254) 3
Section 2101 (28 U. S. C. 2101) 3

MISCELLANEOUS:

Opinion and Order of FPC, dated April 29, 1948, FPC Docket No. E-6104..2, 4, 19, 20, 25, 33, 34, 35, 36, 41
Opinion and Order of SEC, dated March 25, 1948, issued as Holding Company Act of 1935 Release No. 8080, — SEC — ..1, 2, 4, 17, 25, 28, 29, 30, 31, 32, 40
Order of SEC, dated August 1, 1947, issued as Holding Company Act of 1935 Release No. 5455, — SEC — 6
Order of Chief Justice, United States Supreme Court, dated January 25, 1949, granting extension of time within which to file petition for Writs of Certiorari..... 3
Prospectus of Electric & Gas dated May 11, 1948, filed with SEC, pp. 3 and 4 42
S. Rep. No. 621, 74th Cong., 1st Sess. (1935)50.....31, 33

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No.

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY, *Petitioner,*

v.

SECURITIES AND EXCHANGE COMMISSION, and THE COMMONWEALTH & SOUTHERN CORPORATION.

No.

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY, *Petitioner,*

v.

FEDERAL POWER COMMISSION and SOUTH CAROLINA ELECTRIC & GAS COMPANY.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

South Carolina Public Service Authority (herein called "Authority") respectfully prays for writs of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered November 10, 1948, affirming orders and opinions of the Securities and Ex-

change Commission (herein called "SEC") under the Public Utility Holding Company Act of 1935 [1] and of the Federal Power Commission (herein called "FPC") under the Federal Power Act,[2] which approved respectively the sale by Commonwealth and Southern Corporation (Delaware) (herein called "Commonwealth") and the acquisition by South Carolina Electric & Gas Company (herein called "Electric & Gas") of all the common stock of South Carolina Power Company (herein called the "Power Company").

OPINIONS AND ORDERS BELOW.

The opinion of the Court of Appeals for the Fourth Circuit is reported at 171 F. 2d 948 (1948). A copy of the opinion and order is set forth in the printed record at pages R-SEC 310 to 317, and R-FPC 324 to 331.[3] The opinions and orders of the two Federal Commissions are set forth in the printed record, the opinion and order of the SEC at pages R-SEC 2 to 29 (R-FPC 74 to 101) and the opinion and order of the FPC at pages R-FPC 2 to 10 (R-SEC 89 to 97).

JURISDICTION.

The judgment of the Court of Appeals for the Fourth Circuit was entered on November 10, 1948. (R-SEC 317; R-FPC 331.) The jurisdiction of this Court is invoked under Section 24(a) of the Public Utility Holding Company Act of 1935, (August 26, 1935, c. 687, Title I, Sec. 24(a), 49 Stat. 834; 15 U. S. C., Sec. 79x(a)), Section 313(b) of the Federal Power Act, (August 26, 1935, c. 687, Title II, Sec. 213, 49 Stat. 860; 16 U. S. C. Sec. 825*l*(b)), Section

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[1] August 26, 1935, c. 687, Title I, Sec. 33; 49 Stat. 838; 15 U. S. C. Sec. 79.

[2] August 26, 1935, c. 687, Title II, Sec. 212; 49 Stat. 847; 16 U. S. C. Sec. 791 et seq.

[3] References to the printed record are designated "R-SEC" in the case of the record on review of the SEC's order, and "R-FPC" in the case of the record on review of the FPC order, followed by appropriate page numbers.

10 of the Administrative Procedure Act, (June 11, 1946, c. 324, Sec. 10, 60 Stat. 243; 5 U. S. C. 1009) and Title 28, United States Code, Sections 1254 and 2101.

By order of the Chief Justice of the United States Supreme Court, dated January 25, 1949, the time within which to file this petition was extended to and including February 23, 1949.

STATUTES INVOLVED.

The pertinent provision of the Public Utility Holding Company Act of 1935 and of the Federal Power Act are set forth in the printed record at pages R-SEC 109 to 111 and page R-FPC 110, respectively.

QUESTIONS PRESENTED.

1. Whether the Court below erred in holding that the decision of the Supreme Court of South Carolina in *Creech* v. *South Carolina Public Service Authority,* 200 S. C. 127, 20 S. E. 2d 645 (1942), was a bar to the right of Petitioner to acquire the stock of the Power Company, when neither Federal Commission ventured to take this position as the basis for its decision and when the Supreme Court of South Carolina itself expressly left this question open.

2. Whether the Court below erred in approving the refusal of both Federal Commissions to consider the most important relevant evidence in the record bearing upon the public and consumer interest, each on the ground that this evidence should properly be considered by the other.

3. Whether under Sections 11(e) and 12(d) of the Public Utility Holding Company Act of 1935 the SEC erred in approving the sale by Commonwealth of the Power Company's stock to Electric & Gas and exempting it from the requirements of competitive bidding, upon a finding that the sale met the statutory standards of Section 12(d) of the Act relating to "the public interest" and "protection

of consumers and investors," when the SEC expressly refused to consider the most important relevant evidence presented by the record bearing upon the public and consumer interest.

4. Whether the Federal Power Commission erred in approving under Section 203(a) of the Federal Power Act the acquisition by Electric & Gas of the stock of the Power Company upon a finding that such acquisition was "consistent with the public interest," when the FPC expressly refused to consider the most important relevant evidence in the record bearing upon the public interest.

STATEMENT.

This case involves a review of an opinion and order of the SEC dated March 25, 1948 (R-SEC 2; R-FPC 74)[4] approving and authorizing under Sections 11(e) and 12(d) of the Public Utility Holding Company Act of 1935 the sale by Commonwealth to Electric & Gas of all of the common stock of the Power Company and exempting the sale from the competitive bidding requirements of the SEC's Rule U-50, and of an order dated April 29, 1948, of the FPC under Sec. 203(a) of the Federal Power Act authorizing the acquisition by Electric & Gas. (R-SEC 89; R-FPC 2.)[5]

The Authority opposed the applications before both Commissions on the grounds that it had made a better offer for the property, that Commonwealth had rejected this offer and had improperly and illegally discriminated against the Authority for the reason that it is a public agency and that the transaction could not be reconciled with the applicable statutory standards in the two Acts relating to the public interest and the interest of investors and consumers, in view of the far greater benefits to be derived by the public and consumers from sale to the Authority as regards reduced

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[4] Issued as Holding Company Act of 1935 Release No. 8080, —— SEC ——.

[5] FPC Docket No. E-6104.

rates, reduced investment, greater power supply, and natural integration of facilities.

Corporations Involved.

The Authority is a corporation, an agency of the State of South Carolina, created by Act No. 887 of the Acts of the General Assembly of South Carolina for 1934 [6] (R-SEC 115; R-FPC 111) with its principal place of business at Moncks Corner, Berkeley County, South Carolina. It owns, operates and sells electric energy from a $60,000,000 Federal Works Agency financed 130,000 kilowatt hydro-electric system in southern South Carolina. The Authority's dam is located at Pinopolis on the Cooper River thirty-five miles from Charleston and generates more than 600,000,000 kilowatt hours per year of cheap hydro-electric power. It sells more than one-quarter of this power to the Power Company, which is located nearby and is the chief natural distribution and transmission outlet for the cheap power the Authority produces. (R-SEC 57-60; R-FPC 42-45.)

The Power Company, a South Carolina corporation, is engaged in the generation and purchase of electric energy and its distribution and sale at retail in Charleston, Beaufort, Aiken, and 135 other communities and rural areas in the Coastal Plain or southern portion of South Carolina. Its generating facilities produced an aggregate of 121,721,399 kilowatt hours in 1946, the greater part of which being steam generated. It sells approximately 303,000,000 kilowatt hours per year and buys more than half of this power from the Authority. The company is also engaged in the manufacture and sale of gas and in rendering bus transportation service in Charleston and nearby communities. All of the presently outstanding 800,000 shares of common stock of the Power Company have been owned by Commonwealth. At issue in these proceedings is the action of the SEC in

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[6] 38 S. C. Stat. at Large, p. 1507; Secs. 8555-11 through 8555-24, Code of Laws of South Carolina, 1942.

approving the sale of this stock to, and the action of the FPC authorizing its acquisition by, Electric & Gas.

Electric & Gas, a South Carolina corporation, is engaged in the generation and purchase of electric energy and its distribution and sale at retail in Columbia, South Carolina, and 63 other communities in the northern and central portions of that State.

Authority's Six-Year Effort to Purchase Power Company.

On August 1, 1947, the SEC, after more than seven years of simplification proceedings under the Public Utility Holding Company Act of 1935, granted conditional approval of a plan proposed by Commonwealth under Section 11(e) of that Act, and issued an order[7] pursuant to Section 11(b)(1) requiring Commonwealth, among other things, to divest itself of the Power Company, all of whose stock it owned.

Prior to the SEC's said order of August 1, 1947, and from time to time since as early as 1941, the Authority was in negotiation with Commonwealth for the purchase of the Power Company. (R-SEC 49, 51; R-FPC 34, 36.) On July 31, 1947, the Authority had offered $10,600,000 for the Power Company's 800,000 shares of capital stock. (R-SEC 50, 51; R-FPC 35, 36.)

Commonwealth's Illegal and Restrictive Conditions.

Commonwealth rejected this offer but early in September, 1947, indicated its willingness to enter into a contract for $12,000,000 with the Authority subject to a number of restrictive conditions. *The Commonwealth-proposed conditions provided among other things for an undertaking by the Authority not to compete with the operating subsidiaries to be retained by Commonwealth in adjacent areas, for continued control by Commonwealth of the Stevens Creek*

[7] Issued at Holding Company Act of 1935 Release No. 5455, —— SEC ——.

Hydro Plant,[8] *and finally, in the event that the sale were not consummated, for the renewal for twenty-five years of the Authority's existing two-year power supply contract with the Power Company.* (R-SEC 50-52; R-FPC 35-37.)

The Authority considered that these conditions were against public policy and illegal.[9] Accordingly, it rejected them by letter dated September 18, 1947, but increased its offer for the stock by $1,000,000, i.e., to $11,600,000. (R-SEC 62-66; R-FPC 47-51.) Meanwhile, in June, 1947, Commonwealth resumed its negotiations with Electric & Gas. (TR-SEC 55, 56.)[10]

Commonwealth Rejects Authority's Offer.

By letter dated October 3, 1947, Electric & Gas offered $10,200,000 for the Power Company's stock. (TR-SEC 35, 36.) Although unsuccessful in inducing Electric & Gas to increase this offer, which was $1,400,000 below that of the Authority, Commonwealth nevertheless accepted it and on October 28, 1947, entered into a contract with Electric & Gas for the sale of the stock. Commonwealth gave as its reason for accepting the less favorable bid that in the opinion of its Board the offer of Electric & Gas was "far more certain of consummation and *did not constitute a competitive publicly operated threat to the neighboring southern companies remaining subsidiaries of Commonwealth.*"[11] (R-SEC 104; R-FPC 108.)

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[8] On Savannah River between South Carolina and Georgia near Clark's Hill Federal Power Project. (See R-SEC 72, 73; R-FPC 57, 58.)

[9] See Sec. 10(h) of the Federal Power Act "That combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electric energy, to restrain trade, or to fix, maintain or increase prices for electric energy or service are hereby prohibited." (August 26, 1935, c. 687, Title II, Sec. 206, 49 Stat. 842, 16 U. S. C. Sec. 803(h).)

[10] "TR-SEC" refers to Transcript of Hearing before SEC, which is included in both records.

[11] Emphasis throughout Petition and Brief supplied by Petitioner.

The *Creech* Case.

In speaking of the Electric & Gas bid as "more certain of consummation" Commonwealth had reference to alleged "doubts" as to the Authority's right to purchase the Power Company's stock by reason of the ruling of the Supreme Court of South Carolina in *Creech* v. *South Carolina Public Service Authority,* 200 S. C. 127, 20 S. E. 2d 645 (1942). (Bonham, C. J., dissenting.) Commonwealth has largely relied upon these "doubts" to justify to the SEC and the Court below its sale to Electric & Gas. (R-SEC 15, 16, 33-37; R-FPC 87, 88, 18-22.)

Under its enabling act the Authority has the broadest powers of acquisition, purchase, and operation, without geographical limitation. These include authority:

> "(7) To build, *acquire,* construct and maintain power houses and any and all structures, ways and means, necessary, useful or customarily used and employed in the manufacture, generation and distribution of water power, steam electric power, hydro-electric power and any and all other kinds of power, including power transmission lines, poles, telephone lines, substations, transformers, and generally all things used or useful in the manufacture, distribution, purchase and sale of power generated by water, steam or otherwise." and
>
> "(8) To manufacture, produce, generate, transmit, distribute and sell water power, steam electric power, hydro-electric power or mechanical power *within and without the State of South Carolina.*" [12]

There is one section of the act, however, which prevents the Authority from making "investigations, studies and considerations" north of Columbia, South Carolina.[13]

In the *Creech* case the South Carolina Court held that the Authority was without power to acquire Electric & Gas, most of whose properties lie north of Columbia. In its opinion the Court also used language which might be taken to

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[12] Sec. 8555-13(7) and (8) Code of Laws of S. C., 1942.

[13] Sec. 8555-13(21) Code of Laws of S. C., 1942 (R-SEC 120; R-FPC 116).

imply that the Authority was without power to acquire completed and operating public utility systems, wherever located. Thus, the statement was made that the Authority had no "power to buy an existing utility system in order to produce, distribute and sell electric power."[14] In the same paragraph of the opinion, however, the Court had first said "It would have been a simple matter for the legislature to have explicitly provided for the purchase of established, existing power plants and public utilities *in the area claimed* but it has not done so."[15]

The Court below has taken the position that the *Creech* decision rested not on the geographical limitation in the enabling act but on a finding that the Authority lacks power to acquire an existing utility system anywhere. (170 F. 2d 951; R-SEC 313-314; R-FPC 327-328.) This view is demonstrably mistaken.

It was precisely because it feared that the broader language of the opinion might reflect on its right to purchase a utility or other property in its own territory that the Authority immediately petitioned the South Carolina Court for a rehearing and, alternatively, for a statement making it clear that the Authority did have power to acquire such properties south of Columbia, *some of which the Authority pointed out it had already purchased.* In denying this petition the unpublished *per curiam* order of the Court stated as follows:

> "The sole question which this Court undertook to discuss and adjudge, as stated in the majority opinion, is 'whether the Authority under the terms of the statute chartering it construed and interpreted in the light of the whole Act, and considering the history of the legislation,—has power to purchase completed and operating electric utility systems situated at and North of Columbia, and the gas and transportation business connected therewith.' The pleadings confined us to a determination of this material question, and the Court did not undertake to pass upon or decide any other

[14] 20 S. E. 2d 650, 651.

[15] 20 S. E. 2d 650.

issue; nor would it be proper to go outside of the record and do so now." (R-SEC 107.)

Furthermore, Chief Justice Bonham, who had dissented vigorously from the original *Creech* decision, made the following separate statement:

> "In view of the fact that four members of the Court have decided the questions raised by the petition for rehearing, I see no need for a rehearing to be had, and therefore, I concur in so much of the foregoing order as refused a rehearing; but with respect to the petition for alternative relief, I think that it would have been entirely proper for the Court, in its majority opinion, to have decided the question of the power of the Authority to acquire completed and operating properties in areas of the State not specifically excluded by the Act.
>
> "The construction of Section 3 of the enabling Act (Acts S.C. 1934, page 1507) was involved in the litigation, as was the first proviso thereto, and therefore I think it would have been within the province of the Court in this case to have determined the rights of the defendants with respect to the acquisition of completed and operating properties within the normal area of the operations of the Authority.
>
> "For the reasons expressed in my dissenting opinion in this case, I think this relief should have been granted." (R-SEC 107-108.)

It seems quite clear, therefore, that the majority of the Court and Chief Justice Bonham all considered that the *Creech* decision was limited to an acquisition north of Columbia and therefore certainly did not decide that the Authority was without power to purchase completed utilities located in its own territory. Nevertheless, the Court below has ruled that the *Creech* case decided just that. (R-SEC 313-314; R-FPC 327-328.)

The Power Company, which the Authority now seeks to acquire, is located south of Columbia in the natural geographical production and distribution service area of the Authority, and obtains more than half the electric energy it sells from the Authority. (R-SEC 57; R-FPC 42.)

Commonwealth and the *Creech* Case.

Although the opinion in the *Creech* case had been issued five years earlier and was well known to Commonwealth throughout the course of its negotiations with the Authority, it had not been put forward as an obstacle to these negotiations nor did it prevent Commonwealth as late as September, 1947, from telling the Authority it would accept $12,000,000 subject to the restrictive conditions. (R-SEC 33, 34, 38; R-FPC 18, 19, 23.) In fact, Commonwealth's President testified before the Commission that this alleged question of uncertainty was not an insuperable obstacle if the Authority had complied with the restrictive conditions proposed by Commonwealth, and that Commonwealth only concluded that the Authority was without the right to buy *"after you wouldn't go along with our conditions."* (R-SEC 37; R-FPC 22.)

The Authority had intended to finance its purchase of the Power Company stock by issuing its bonds and in line with the prudent procedure customary in State agency bond cases proposed to secure the approval of the South Carolina Supreme Court. (R-SEC 66, 67, 72; R-FPC 51, 52, 57.) Since South Carolina then had no declaratory judgment law that applied in the absence of a written contract, the question could only be raised for judicial determination either upon the basis of a firm sales agreement or upon an agreed statement of facts as an actual controversy based upon a Commission order for competitive bidding.[16] During the earlier negotiations Commonwealth agreed to cooperate in having the matter settled by entering into such an agreement. Its final refusal to accept the offer of the Authority frustrated this opportunity to secure a final determination. (R-SEC 38, 39; R-FPC 23, 24; TR-SEC 169, 170.) Had the SEC ordered open competitive bidding in this case it would have created an immediate justiciable controversy as to the Authority's right to bid which could and

[16] Sections 660 and 668, Code of Laws, S. C., 1942. Set out in full at R-SEC 133.

would have been settled in a few weeks by the State Courts of South Carolina.

Public Interest Considerations.

Apart from the fact that the Authority had made an offer for the Power Company $1,400,000 higher than the offer of Electric & Gas, the uncontroverted evidence in the record showed that for other considerations the interests of the public and of consumers required both Commissions below to disapprove this transaction. These considerations may be briefly summarized as follows:

1. The Authority and the Power Company serve the same area, the Coastal Plain of South Carolina which includes Charleston and most of the industrial centers of the State. The prosperity of South Carolina depends in large measure upon the healthy growth and development of the Coastal Plain, which in turn depends upon having available abundant cheap electric power.[17] A combination of the Authority and the Power Company, because of the objective circumstances of their relative geographical positions, their financial condition and the make-up of their generating and distributing plants will assure this result. A combination of the Power Company and Electric & Gas, for precisely the same reasons, makes such a result impossible. Instead it condemns the consumers of the Coastal Plain and all who depend upon the development of that area to the certain prospect of an inadequate power supply and high rates.

2. More specifically, the determining circumstances affecting the three utilities are these:

(a) *Generating Capacity*—The Authority produces at its Pinopolis hydro located in the Coastal Plain 35 miles from

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[17] See testimony of Senator O. T. Wallace and Mayor Morrison of Charleston, S. C. appearing at Vol. VIII pp. 233-235, and pp. 244-246 of the Transcript of Hearing before South Carolina Public Service Commission, (herein referred to as "TR-SCPSC") which is included in both records.

Charleston more than 600,000,000 kilowatt hours per year of cheap hydro-electric power. (R-SEC 57; R-FPC 42.) The Power Company, with an extensive distributing network serving Charleston and the Coastal Plain, sold in 1946 approximately 303,000,000 kwh per year, more than half of which it purchased from the Authority. (R-SEC 57; R-FPC 42.) Its own production is low, 121,721,399 kwh in 1946, largely generated by high-cost steam plants. (R-SEC 58, 91; R-FPC 43, 4.) These steam facilities, although wholly inadequate to meet the Power Company's service commitments, are more than adequate to "firm up" the Authority's hydro. (R-SEC 47, 58, 59, 91, 92; R-FPC 32, 43, 44, 4, 5.) Electric & Gas, which serves the central part of the State, generated in 1946 569,387,890 kwh, but nevertheless, as the FPC found, was obliged to supplement this by 122,000,000 kwh through purchase and interchange to meet its service commitments. (R-SEC 91; R-FPC 4.) The principal reason for Electric & Gas's tight generating position is that it has oversold by approximately 125% the power from its principal hydro at Lake Murray, approximately 300,000,000 kwh per year, on long term wholesale contracts expiring in 1980 to outside utilities serving other areas than its own. (R-SEC 46; R-FPC 31.) Since it is obvious that a combination of two such power-short companies would be unable to meet the present demands of their own joint areas, to say nothing of future increased demand, Electric & Gas has stated in the record that the consolidated companies plan a construction program of approximately $20,000,000 over the next five years of which at least $11,000,000 will be for new generating capacity. (TR-SCPSC Vol. VIII, 59, 60, 131-132.)

(b) *Financial Position*—The relative revenues and earnings of the Power Company whether considered in relation to total assets, plant account or stockholders' equity, are substantially greater than the relative revenues and earn-

ings of Electric & Gas. (R-SEC 41-46, 85, 86; R-FPC 26-31, 70, 71.) Thus while the Power Company, with the Authority's cheap power to sell, has been earning approximately 12% on its net stockholders' equity, the evidence shows that Electric & Gas is in dubious financial shape and is earning about 3.6% on its net stockholders' equity—this despite the fact that the average kwh cost of electric energy to consumers of the Power Company prior to its sale to Electric & Gas was 2.6 cents as against 3.032 cents for consumers of Electric & Gas. (R-SEC 40, 41; R-FPC 25, 26.) The Power Company is "ripe" for a rate reduction. (R-SEC 46-48; R-FPC 31-33.) Since the consummation of the sale Electric & Gas has obtained an approximate 10% increase in its electric rates. (R-SEC 305; R-FPC 319.) Further as to earnings, it appears that Electric & Gas, although it refused to promise any reduction in rates upon acquisition of the Power Company (and has in fact raised its own rates), nevertheless expected that the stock which it issued to finance the acquisition would earn approximately 20% in the first year. (R-FPC 15, 16.) During the preceding year Electric & Gas failed to make its common stock dividend by $115,000. (R-SEC 44, 45; R-FPC 15, 29, 30.) Finally it appears from the record that upon the acquisition of the Power Company by Electric & Gas the stockholders' equity drops from approximately 37% and 31% respectively for the two companies to a joint equity of approximately 20%. (R-FPC 13.)

3. The specific consequences in these circumstances of the acquisition of the Power Company by Electric & Gas for the consumers of both companies, and particularly the consumers of the Coastal Plain, are not far to seek.

(a) *Adequacy of Power Supply*—It is quite clear that with the combination of these power-deficient utilities serving different areas neither group of consumers has assurance that even its present needs can be served until the completion of the projected costly 5-year construction pro-

gram. It is equally clear that with a combined equity of 20% the consolidated companies will do well to finance this construction program on any terms, and can scarcely do so advantageously. On the other hand, a combination of the Power Company and the Authority would bring together without significant further construction ample firm power to meet the present and future needs of the vital Coastal Plain, with a probable surplus left over to supplement the shortages of Electric & Gas in its own area. (R-SEC 47, 57, 58,; R-FPC 32, 42, 43.)

(b) *Rates*—At the hearing before the South Carolina Public Service Commission, *the Authority made a firm offer upon acquisition of the Power Company to give the consumers of the Coastal Area an immediate 10% rate reduction, with others to follow.* (R-SEC 55, 56; R-FPC 40, 41.) The record is clear that the position and condition of the two companies is such that upon their combination there would be not only the will but, more important, the ability to make these reductions. On the other hand, Electric & Gas flatly refused to promise any reduction in rates and said that it only hoped that it could avoid an increase. (R-SEC 75, 76; R-FPC 60, 61; TR-SCPSC, Vol. VI, 74-76.) There has, of course, been one already in Electric & Gas's own area. Quite apart from whether or not the Electric & Gas-Power Company combination would be *willing* to reduce rates, it is perfectly clear that *they are in no position to do so.* For one thing, most of the total new construction program of $20,000,000 will find its way into the combined rate base. For another there can be no doubt that, that as a practical matter the high earnings of the Power Company, which the responsible officer of the South Carolina Commission's Staff described as being "ripe for a rate reduction" (R-SEC 46-48; R-FPC 31-33), will be averaged out with the low earnings of Electric & Gas. It is well known that the opportunities for high inter-company charges between parent and subsidiary are very great and

are subject to little practical control by regulatory agencies. (R-FPC 12, 13.) The record shows that Electric & Gas refused to make any commitments to the South Carolina Commission respecting such charges. (R-SEC 82-84; R-FPC 67-69, TR-SCPSC, Vol. VI, 123-125.)

4. Finally, there are other considerations which should be mentioned briefly. The Authority has undertaken to sell distribution facilities to municipalities and rural cooperatives in order to assure the wider use of power. (R-SEC 56; R-FPC 41.) Electric & Gas, however, has refused on principle to make such sales. (R-SEC 75; R-FPC 60.) In this same connection the record shows that control of the Power Company gives access through the latter's Stevens Creek Plant to the cheap power available to South Carolina from the great Federal hydro project at Clark's Hill. (R-SEC 35, 73; R-FPC 20, 58.)

These considerations give an added point to the policy issue involved here. Most of the power available to the Coastal Plain is public power, power from the great Pinopolis and Clark's Hill hydro projects built at the taxpayers' expense. Only if the Authority acquires the Power Company can this enormous investment of the taxpaying public be dedicated to the service of the consuming public on the terms contemplated when the investment was made, i.e., as freely and as inexpensively as possible. (R-SEC 59, 60; R-FPC 44, 45.)

It is significant that at the hearings before the South Carolina Commission and the SEC no witness was bold enough to deny that the Authority-Power Company combination was a better one in the public interest than the combination of the Power Company with Electric & Gas and that even hostile witnesses impliedly admitted this. (R-SEC 47, 77-82; R-FPC 32, 62-67.)

Order and Opinion of the SEC.

On November 12, 1947, Commonwealth filed its application with the SEC seeking authorization and approval of the sale to Electric & Gas and exemption from the competitive bidding requirements of Rule U-50. By its opinion and orders of March 25, 1948, the Commission granted these applications in full.

In its opinion the SEC, without purporting to hold that the *Creech* decision was a bar to the Authority's right to acquire the Power Company, did find that the decision created "grave doubt" as to this right, that delay would be involved in resolving this doubt through a final ruling on the matter by the Supreme Court of South Carolina, that this delay might be injurious to the interests of Commonwealth, and that accordingly Commonwealth's management was warranted in rejecting the Authority's superior offer. (R-SEC 19, 20; R-FPC 91, 92.)

The SEC accepted at face value Commonwealth's profession that its decision to accept the lower offer was in large part the result of this "doubt". (To its stockholders, of course, Commonwealth had also justified its action on the ground that sale to the Authority would constitute "a publicly operated threat to the neighboring southern companies remaining subsidiaries of Commonwealth.") (See page 7 *supra*.) The Commission ignored the fact that any delay in securing a court decision was directly ascribable to Commonwealth's refusal to honor its commitment to cooperate in getting one. (TR-SEC 169, 170.) The SEC's findings as to delay were inconclusive and were made in the face of a showing in the record that in two comparable cases decisions of the South Carolina Supreme Court had been forthcoming within 30 and 60 days respectively after the commencement of proceedings. (R-SEC 39; R-FPC 24.) Its findings as to any possible injury to Commonwealth as a result of a few weeks delay, (after simplification proceedings under the Act going back

for over seven years), were speculative and unsubstantial. (R-SEC 20; R-FPC 92.)

Finally, and most important, the SEC failed to weigh against any such possible injury to Commonwealth the vital facts relating to "consumers" and "public interest" as required by its Act and Rules before approving the sale. (R-SEC 21, 22; R-FPC 93, 94.)

Thus the SEC declined to consider as pertinent to its decision any of the voluminous evidence bearing upon the consumer and the public interest, which it declared it left without prejudice to the consideration of the FPC. Its justification for doing so is most succinctly set forth in the SEC brief in the Court below.[18]

> "Petitioner observes that Section 12(d) of the Holding Company Act speaks of the public interest and the protection of investors, and its principal argument is that the Commission should therefore have considered whether a sale to Petitioner would have been more advantageous to consumers than a sale to Electric & Gas. This, however, was an issue, assuming it to be otherwise within the scope of Section 12(d), directly committed to the Federal Power Commission which alone had jurisdiction over the acquiring Company and consequently the acquisition aspect of the transaction." (SEC Brief Below, p. 14.)

Later in its brief (SEC Brief Below, p. 21, 22) the SEC goes on to explain that in its view the reason that only the FPC could properly give consideration or weight to the consumer and public interest aspects of the transaction was that this was required by Section 318 of the Federal Power Act, designed to prevent overlapping of jurisdiction between the SEC and FPC.

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[18] The SEC brief in the Court below, herein called "SEC Brief Below", is filed as Appendix "A" to this petition.

Order and Opinion of the FPC.

On November 19, 1947, Electric & Gas applied to the FPC for approval of the acquisition under Section 203(a) of the Federal Power Act. On April 29, 1948, the FPC entered its order and opinion granting this application.

In its opinion the FPC has summarized at length the arguments of the Authority and other opposing parties as to why the acquisition by Electric & Gas was not in the public interest. Like the SEC it does not deny that substantially greater benfits to the public and consumers would derive from sale to the Authority. However, the FPC notes in its opinion that it "is confronted with the fact of the very limited scope of its jurisdiction in this case, running only to the acquisition of stock by the Applicant, and the division of authority and responsibility with other regulatory agencies over the transaction as a whole". (R-SEC 93; R-FPC 6.) It goes on to declare that such matters as the Authority's higher offer and Commonwealth's discriminatory course of dealings with the Authority were for the SEC to consider as "matters relating to the sale . . . over which we have no jurisdiction". Similarly, it found the rate issue to be "subject to the jurisdiction of the State Commission." (R-SEC 95; R-FPC 8.)

As regards the other evidence before it showing greater advantage to consumers and the public from sale to the Authority, the FPC dismissed this as relating to a "plan not presently before us" and hence was "insufficient to support a finding that the proposal formally before us is not consistent with the public interest". (R-SEC 94; R-FPC 7.) It appears, moreover, from the FPC's brief in the Court below [19] that that Commission considered that the Authority had "for all practical considerations" been eliminated as a contender for the Power Company

[19] The FPC brief in the Court below, herein called "FPC Brief Below", is filed as Appendix "B" to this petition.

by the SEC's prior action approving the sale to Electric & Gas and that accordingly by the time the matter came to the FPC for decision there was available no real alternative to acquisition by Electric & Gas. (FPC Brief Below, pp. 14 and 15.)

The FPC did not, however, make any reference to the *Creech* case or seek to justify its decision on the grounds that the Authority's offer could be disregarded because of the *Creech* decision or any "doubts" engendered thereby.

After thus sidestepping the above-mentioned important facts bearing on the issues of public and consumer interest, the FPC went on to base its approval of the sale to Electric & Gas upon a peculiar interpretation of the decision of the Ninth Circuit Court of Appeals in *Pacific Power & Light Company et al.* v. *Federal Power Commission,* 111 F. 2d 1014 (1940), which the Commission regarded as requiring approval unless there were a positive disadvantage and injury to the public interest from the proposed transaction. (R-SEC 94; R-FPC 7.) Viewing the matter without taking into consideration the Authority's offer, the FPC was unable to find any such injury or disadvantage in the case of sale to Electric & Gas. (R-SEC 94; R-FPC 7.)

The Opinion Below.

On November 10, 1948, the Court below handed down its opinion affirming the orders of both Commissions. (The opinion of the Court is reprinted at R-SEC 310 to 317 and R-FPC 324 to 331.) The opinion turns upon the view of the Court that the Authority's right to purchase the stock of the Power Company was adversely decided by the Supreme Court of South Carolina in the *Creech* case, despite the clear statement of the South Carolina Court that it had not decided and would not then decide that question. The Court below ignored the express refusal of both Commissions to consider the most important relevant evidence be-

fore them bearing upon the public and consumer interest and it paid no attention to the erroneously narrow construction of their respective statutes by which each Commission justified this refusal.

REASONS FOR GRANTING THE WRITS.

Petitioner is in the unusual position of seeking judicial relief, not to restrain the unwarranted encroachments of over-zealous administrative agencies, but to free the two Commissions below from inhibitions self-imposed early in 1948 which would prevent them from performing their statutory duty to protect the public, consumers and investors.

Petitioner appealed from the action of the two Federal Commissions because it thought that each had made one of the clearest and most serious errors of law in its entire administrative history. Each statute called for consideration of the public and consumer interest and each Commission left to the other consideration of the unquestioned greater public advantages of an Authority-Power Company combination. The SEC then approved the sale by giving preponderant weight to the possibility of some adverse effect on Commonwealth of alleged "doubts" as to the local law of South Carolina. The FPC apparently did not think that the local law question presented any difficulty at all, but also approved the transaction by finding that when considered *in vacuo*, without regard for the Authority's offer, it presented no positive detriment to the public interest. To Petitioner's astonishment the Court below went even beyond the SEC in holding that the South Carolina law was not only doubtful but already decided against us. This was clearly erroneous in view of what the South Carolina Court said when denying rehearing in the *Creech* case that it had not and would not then decide the point. The proper and easy answer to this question of the local law would have been for the SEC to have or-

dered competitive bidding for the Power Company's stock and thereby to have enabled the Authority to get a decision from the South Carolina Court. A competitive bidding order would have created a justiciable issue upon which the Authority could have secured such a decision. (Page 11, *supra.*) It must be remembered that Commonwealth had earlier undertaken to help the Authority to do this by making a contract with it. When later Commonwealth reneged the only way the necessary issue could be raised was by a competitive bidding order. (Page 11, *supra.*) If the SEC had weighed the public interest factors involved, instead of leaving the matter to the FPC, it would undoubtedly have followed such a course. In any event it committed a palpable error of law in not considering these relevant facts in reaching its decision.

The FPC was confused by what the SEC did and also failed to consider the public interest issues raised by the alternative of an Authority-Power Company combination.

While this may not be a case of such world-shaking importance as some with which this Court must deal, it is one of substantial importance. It is a case of two Federal Commissions each passing to the other a responsibility committed to it by statute so that vital public interests have been neglected and it is a case where a Circuit Court of Appeals has avoided passing on the issue before it by treating as decided a question of State law expressly left open by the State Court and which should have been left to the State Court. The end result has been to deprive half the people of South Carolina of much lower utility rates and to permit a public body to be discriminated against by the high-handed and admittedly selfish tactics of a big public utility holding company with complete disregard for the public interest.

In summary, Petitioner urges this Court in its discretion to grant these writs for the following reasons:

1. The United States Court of Appeals for the Fourth Circuit by affirming the said orders of the SEC

and FPC has decided questions of Federal law of general importance and of substance relating to the construction and application of two statutes of the United States (The Public Utility Holding Company Act of 1935 and the Federal Power Act) and their relation to each other, which have not been but which should be settled by this Court.

2. The United States Court of Appeals for the Fourth Circuit has decided an important question of State law in a way directly in conflict with applicable State decisions, i.e., by deciding that the *Creech* case bars the Petitioner's right of purchase in this situation when that question was expressly left open by the Supreme Court of South Carolina, and in so doing has departed from the rule laid down by this Court that whenever possible Federal Courts should leave matters of State law to the decision of the State Courts.

CONCLUSION.

For the foregoing reasons, supported by argument in the accompanying brief, it is repectfully submitted that the petition for writs of certiorari should be granted.

Respectfully submitted,

R. M. Jefferies,
Wm. S. Youngman, Jr.,
Duncan C. Lee,
Counsel for South Carolina Public Service Authority.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No.

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY, *Petitioner,*

v.

SECURITIES AND EXCHANGE COMMISSION, and THE COMMONWEALTH & SOUTHERN CORPORATION.

No.

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY, *Petitioner,*

v.

FEDERAL POWER COMMISSION and SOUTH CAROLINA ELECTRIC & GAS COMPANY.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

I.

THE OPINIONS AND ORDERS BELOW.

Reference to the opinions and orders below is made in the petition, page 2. They are set forth in full in the printed record. The opinion of the Court of Appeals for the Fourth Circuit appears at R-SEC, pages 310 to 317 and R-FPC, pages 324 to 331, the opinion and order of the SEC at R-SEC, pages 2 to 29 and R-FPC, pages 74 to 101, and the opinion and order of the FPC as R-SEC, pages 89 to 97 and R-FPC, pages 2 to 10.

II.

JURISDICTION.

The statutory provisions under which the jurisdiction of this Court is invoked are shown in the petition, page 2.

III.

STATEMENT OF THE CASE.

This appears in the petition, pages 4 to 21.

IV.

SPECIFICATION OF ERRORS TO BE URGED.

Errors to be urged are those specified in the petition, pages 3 and 4, under the heading "Questions Presented."

V.

ARGUMENT.

1. **The United States Court of Appeals for the Fourth Circuit, by affirming the said orders of the SEC and FPC, has decided questions of Federal law of general importance and substance relating to the construction and application of two statutes of the United States (The Public Utility Holding Company Act of 1935 and the Federal Power Act) and their relation to each other, which have not been but which should be settled by this Court.**

This is a case of far reaching importance to the public and particularly to consumers and investors of public utilities throughout the United States. The central issue on the merits is whether the public may be assured that the SEC and FPC will only authorize transactions coming before them for approval under their respective Acts when the standards established in those Acts are fully met.

We have here the curious spectacle of two Commissions who in early 1948, after a distinguished record of energetic concern for the public interest, have, in a sudden excess of

timidity, adopted so narrow a view of their jurisdiction and powers that unless their construction is corrected by this Court, the public interest must in the future, as it has here, frequently fall abandoned between them.

Neither Commission has denied (and the Court below has made no finding to the contrary) that the evidence before them shows that the consuming public of South Carolina would be far more benefitted by the sale of this property to Petitioner than the sale which they have approved to Electric & Gas. Nor have they denied that the investors of Commonwealth would have received an additional $1,400,000 from sale to the Authority, or that Commonwealth's course of dealings with the Authority, particularly as regards the restrictive conditions sought to be imposed, was highly discriminatory if not illegal.

In the face of such a record the two Commissions have approved the sale to Electric & Gas only by refusing to consider the most important relevant evidence before them. It is well established by the decisions of this Court that the refusal of an administrative agency to consider relevant evidence is an abuse of discretion for which the agency's order may be set aside.[20] Here each of the two Commissions has admitted its failure to consider relevant evidence but has justified its refusal by so misconstruing its statute as to exclude the evidence from what it considers to be the narrow purview of its own jurisdiction.

The opinion and order of each Commission is based upon such reversible error. Together these errors represent decisions of questions of Federal law of substantial importance which must inevitably affect the vital interests of consumers of public utility services, investors in public utility securities, and the tax-paying public throughout the country. These questions have not been but should be decided by this Court.

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[20] *Morgan* v. *U. S.*, 298 U. S. 468, 480 (1936), *The Chicago Junction Case*, 264 U. S. 258, 265 (1924). See also cases cited by Mr. Justice Brandeis in his concurring opinion in *St. Joseph Stockyard Co.* v. *U. S.*, 298 U. S. 38, 75 (1936).

The Court below evidently tried to avoid passing upon these questions of law by holding that the Supreme Court of South Carolina in its decision in the *Creech* case had already ruled the Authority to be without power or legal right to purchase this property. This decision of the Court below was plainly wrong, as will be shown more fully hereinafter. The basic questions presented to this Court are the errors in interpretation of Federal statutes made by the two Commissions in their opinions and orders.

A. THE SEC HAS ERRED IN HOLDING THAT UNDER SECTION 12(d) OF THE HOLDING COMPANY ACT AND RULE U-50 ISSUED THEREUNDER THERE WAS NO COMPULSION UPON IT TO WEIGH OR GIVE CONSIDERATION TO EVIDENCE BEARING UPON THE INTERESTS OF THE PUBLIC AND CONSUMERS.

Section 12(d) of the Holding Company Act expressly states that the SEC must in approving transactions thereunder (including of course the sale of securities in connection with a Section 11(e) plan) act "in the public interest" and "for the protection of consumers or investors."[21] These standards are in terms set forth again in the SEC's Rule U-50 issued under Section 12(d).[22]

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[21] Section 12(d) of the Public Utility Holding Company Act makes it unlawful for any holding company to sell the securities of a subsidiary

> "in contravention of such rules and regulations or orders regarding *the consideration to be received for such sale, maintenance of competitive conditions*, fees and commissions, accounts, disclosure of interest, and similar matters as the Commission deems necessary or appropriate in the *public interest* or for the protection of *investors* or *consumers* or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder." (Set out in full at R-SEC 111.)

[22] The SEC's Rule U-52, issued pursuant to Section 12(d) of the Public Utility Holding Company Act of 1935, requires public competitive bidding on the sale of securities by a registered holding company except *inter alia* where the Commission find that such competitive binding is not "appropriate to aid the Commission . . . to determine . . . whether any term or condition of such issue or sale

Nevertheless the SEC was able to approve under Sections 12(d) and 11(e) of its Act and exempt from the competitive bidding requirements of its Rule U-50 a sale which imposed upon the stockholders of Commonwealth a sacrifice of $1,400,000 and offered to the public and consumers of the area far fewer advantages (if not positive detriment and harm as Petitioner believes) than the available alternative of sale to Petitioner. The SEC achieved this result by virtue of a definition of its jurisdiction which leaves meaningless the statutory reference to the public and consumers.

The burden of the SEC's opinion concerns the *Creech* decision and its effect upon the position of the Authority. Almost as an afterthought, but indispensably to the final result, the Commission goes on to say that the substantial considerations of consumer and public interest relating to financial structure, generating capacity, etc., were left "without prejudice" to the FPC. (R-SEC 21, 22; R-FPC 93, 94.) In its brief below it explains that in its view the question "whether a sale to Petitioner would have been more advantageous to consumers than a sale to Electric & Gas . . . was an issue . . . " of which the FPC "alone had jurisdiction." (SEC Brief Below, p. 14.)

The SEC brief spells out the full syllogism behind this surprising conclusion, as follows. These public policy issues pertain to the "acquisition" phase of the transaction. The FPC alone had jurisdiction of the acquiring company, Electric & Gas, and therefore of the acquisition. Consequently the FPC alone had jurisdiction to consider and weigh the evidence bearing on these policy issues. Q. E. D. (SEC Brief Below, pp. 14-25.)

The fallacy in this line of reasoning is apparent. It lies in the major premise that the interest of the public and

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is detrimental to the *public interest* or the *interest of investors* or *consumers*" or where the requirement is not "necessary or appropriate in the *public interest* or for the protection of *investors* or *consumers* to assure the *maintenance of competitive conditions, the receipt of adequate consideration* or the reasonableness of any fees or commission to be paid with respect to sales of securities subject to Section 12(d) of the Act." (Set out in full at R-SEC 112-114.)

consumers relates *only* to the "acquisition" phase of the transaction and that accordingly the SEC can close its eyes to evidence bearing upon these issues when weighing the merits of the "disposition." The pertinent language of the Holding Company Act and Rule U-50 which specifically enjoin the SEC to protect the interest of the public and consumers when passing upon a "disposition" is sufficient demonstration of this error. There is nothing in the Act or elsewhere, to justify the Commission disregarding the principal consequences for consumers and the public of the single transaction before it, considered as a whole and in all its aspects.

In support of its reasoning the SEC points out in its brief that Section 318 of the Federal Power Act provides in effect that where a person is subject with respect to the sale, etc., of securities to both a requirement, rule or regulation under the Holding Company Act and a requirement, rule or regulation under the Federal Power Act, the requirement of the Holding Company Act shall, in the absence of an express exemption by the SEC, apply. (SEC Brief Below, pp. 21, 22.)[23] This Section was designed to de-

[23] The full text if Section 318 of the Federal Power Act is as follows:

> "SEC. 318. If, with respect to the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security, the method of keeping accounts, the filing of reports, or the acquisition or disposition of any security, capital assets, facilities, or any other subject matter, any person is subject both to a requirement of the Public Utility Holding Company Act of 1935 or of a rule, regulation, or order thereunder and to a requirement of this Act or of a rule, regulation, or order thereunder, the requirement of the Public Utility Holding Company Act of 1935 shall apply to such person, and such person shall not be subject to the requirement of this Act, or of any rule, regulation, or order thereunder, with respect to the same subject matter, unless the Securities and Exchange Commission has exempted such person from such requirement of the Public Utility Holding Company Act of 1935, in which case the requirements of this Act shall apply to such person."

fine the respective jurisdiction of the two Commissions in case of overlapping. Quite obviously it was intended to prevent administrative overlapping. It was surely not intended to relieve the SEC of its duty under Section 12(d) to protect investors and consumers, nor does it imply that the two Acts set up two conflicting or opposed standards of public policy and public and consumer interest, one applicable to SEC action and the other to action of the FPC. On the contrary, as noted by the SEC in its brief below, "The Holding Company Act and the Federal Power Act were enacted together as component parts of a single statute, the former being Title I and the latter Title II, Part II of Public Law 333 of the 74th Congress, 49 Stat. 803, 847." (SEC Brief Below, p. 21.) As the SEC also points out, (SEC Brief Below, p. 24, fn. 20) the Senate Report on the Federal Power Act speaks as follows of Section 203(a):

> "It complements Title I of the Bill by directing the [Federal Power] Commission to prevent transfers or consolidations of property which would impair the ability of public utilities to render adequate service or impede, or tend to impede, the coordination in the public interest of facilities subject to the jurisdiction of the Commission." (S. Rep. No. 621, 74th Cong., 1st Sess. (1935) 50.)

The record before the SEC showed overwhelmingly that the effect of this transfer would mean such impairment. The foregoing statement of policy in the Senate Report was made with reference to Section 203(a) of the Federal Power Act but it is equally applicable to the language of Section 12(d) of the Holding Company Act enjoining protection for the public and consumers. Otherwise that language is meaningless. The SEC admits that the two Acts complement each other and represent an integrated piece of legislation. It can hardly be said therefore that Section 318 of the Power Act excuses the SEC from its duty under Section 12(d) of the Holding Company Act to protect consumers and the public interest or to consider the effect

upon them of the proposed transaction viewed as a whole, in both its "disposition" and "acquisition" phases. In fact, the distinction between the two "phases" is wholly artificial, and attempting to make such an unrealistic distinction led the SEC into the error of law it committed, that of failing to consider the most important relevant evidence in reaching its decision.

On any interpretation the language of Section 318 fails the SEC in its argument as applied to this situation. Section 318 speaks of a "person" who may be subject to the requirements of both Acts with respect to a particular transaction. The "person" before the SEC here was Commonwealth, and Commonwealth, as both Commissions have pointed out, was not subject to the FPC as regards this sale. Electric & Gas was the applicant before that Commission, and there could therefore be no such administrative overlapping as Section 318 was intended to resolve.

The SEC had to ignore the consumer and public interest evidence before it in reaching the result it did; otherwise it could never have given such preponderant weight to the preferences of Commonwealth's management. The SEC had accepted the argument that Commonwealth was justified in accepting the Authority's superior offer because of the "doubts" arising from the *Creech* decision. (R-SEC 19; R-FPC 91.) Even assuming that these doubts were *bona fide* ones on Commonwealth's part, the possible injury to Commonwealth from the chance that sale to the Authority might be held to be *ultra vires* or from the inconsequential delay involved in securing judicial clarification of the matter were all speculative and unsubstantial compared with the certain detriment and injury to the public and consumers from sale to Electric & Gas—so much so, in fact, that *the SEC could not possibly have justified its approval of this sale if it had given weight to these public interest considerations.* It is this that makes the Commission's view of its own jurisdiction and powers, as justifying its omission to give weight to these considerations, of such central importance to its final decision in this case.

B. THE FPC ERRED IN TAKING TOO NARROW A VIEW OF ITS OWN JURISDICTION IN PASSING UPON TRANSACTIONS UNDER SECTION 203(a) OF THE FEDERAL POWER ACT.

Whatever the errors and derelictions of the SEC, it can hardly be argued that in determining whether this transaction was "consistent with the public interest" within the meaning of Section 203(a) of the Federal Power Act,[24] the FPC, at least, was not required to give consideration and weight to the evidence before it bearing upon the consumer and public interest issues raised by the superior offer of the Authority. This evidence was certainly highly relevant to whether, in the language of the Senate Report, the transfer "would impair the ability of public utilities to render adequate services or impede, or tend to impede, the coordination in the public interest of facilities subject to the jurisdiction of the Commission." (See page 31, *supra*.) Yet the FPC refused to consider this evidence and justified its refusal by an erroneously narrow and restrictive interpretation of its own jurisdiction and by what it considered to be the practical effect of the prior action taken by the SEC.

The FPC disregarded all evidence relating to Commonwealth's acceptance of the lower offer of Electric & Gas and

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[24] The full text of Section 203(a) of the Federal Power Act is as follows:

> "SEC. 203 (a) No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so. Upon application for such approval the Commission shall give reasonable notice in writing to the Governor and State commission of each of the States in which the physical property affected, or any part thereof, is situated, and to such other persons, as it may deem advisable. After notice and opportunity for hearing, if the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same."

its discriminatory dealings with the Authority on the ground that these factors pertained to the "sale . . . over which we have no jurisdiction." (R-SEC 95; R-FPC 8.) This was erroneous. The evidence was relevant to the public interest and should have been considered and given proper weight by both Commissions.

The FPC also erred in refusing to weigh in its decision the fact that a combination of the Power Company with the Authority would inevitably result in lower rates to the Power Company's consumers than the combination with Electric & Gas—owing to such objective factors as financial structure and lower requirements for new generating plant —on the ground that the *regulation* of rates was a matter for the South Carolina Commission. (R-SEC 95; R-FPC 8.)

The point as to rates, of course, was that in view of the certain increase in the joint rate base from the $20,000,000 5-year construction program which Electric & Gas admitted would be necessary if it acquired the Power Company—all or virtually all of which would be unnecessary if the Authority acquired the Power Company (See page 15 of the petition)—and in view of the high probability that the low earnings of the parent would be averaged out with the high earnings of the subsidiary as a result of uncontrollable inter-affiliate charges (See pages 15, 16 of the petition), substantially higher rates would almost certainly result from a combination of the Power Company with Electric & Gas than from its combination with the Authority. The two Federal Commissions were not called upon to regulate rates, but they should have considered the rate consequences of action they took. By approving sale to Electric & Gas they approved a holding company set-up which inevitably resulted in higher rates *because the set-up itself made it practically much more difficult if not impossible for any regulatory agency thereafter to remedy the situation.*

The FPC thus managed by the same line of reasoning as the SEC to eliminate from consideration a substantial part

of the evidence bearing upon the public and consumer interest. The FPC also found that it could ignore this and the remaining such evidence, i.e., relating to adequacy of generating facilities, financial condition, control of power from the Clark's Hill project and sales to rural cooperative and municipalities, by virtue of its interpretation of the decision of the Ninth Circuit Court of Appeals in *Pacific Power & Light Company et al.* v. *Federal Power Commission*, 111 F. 2d 1014 (1940). In this case the Court had held that in order to find a proposed transaction "consistent with the public interest" within the meaning of Section 203(a) of the Federal Power Act it was not necessary that there should be a positive benefit to the public so long as the public was insured against disadvantage. (111 F. 2d 1014, 1016; R-SEC 94; R-FPC 7.) This decision the FPC now takes quite erroneously to mean that a proposed transaction should be considered and passed upon by it without any regard for its attendant circumstances, such as, in the present case, the far greater advantages to the public and consumers which would result from sale to the Authority. After quoting the pertinent passage from the opinion of the Court in the *Pacific* case, (111 F. 2d 1014, 1016) the FPC then dismisses the Authority's superior offer with its vital bearing upon the consumer and public interest by saying:

> "Granted such a proposal, or some other plan not presently before us, might be better in certain aspects, nevertheless that fact is insufficient to support a finding that the proposal formally before us is not consistent with the public interest." (R-SEC 94; R-FPC 7.)

This reasoning is plainly fallacious. The Authority's offer was certainly "before" the FPC as among the attendant circumstances, established by the record, which the FPC should have weighed in considering the application of Electric & Gas. With this more advantageous alternative available, sale to Electric & Gas does, of course, result in "disadvantage" to the public. If the FPC had taken Petition-

er's offer into consideration it could hardly have reached any other result. There is certainly nothing in the *Pacific* case which prevents the FPC from considering such circumstances. Rather it is quite clear that the Court believed that the FPC should consider them, for later in the same opinion it says "the Commission must necessarily take an overall view and in many cases it will, as its counsel says, be called upon to weigh considerations pro and con." (111 F. 2d 1014, 1017)

Finally, there can be no doubt that the FPC found it easier to close its eyes to the greater public advantages of sale to the Authority since it quite evidently felt, as its brief below shows, that the prior action of the SEC approving sale by Commonwealth to Electric & Gas had had the effect of eliminating the Authority's offer as an available alternative.

> "When the order here under review was issued by the Federal Power Commission, the Securities and Exchange Commission had already entered the divestment order, Commonwealth had contracted to make the sale to Electric & Gas, and the Securities and Exchange Commission had approved the sale and denied a petition for rehearing.
>
> * * * * *
>
> "In summing up this point, the record shows that when the matter was before the Federal Power Commission the chances of Authority acquiring the stock of Power Company were, for all practical purposes, *nil*. * * *" (FPC Brief Below, pp. 14, 15.)

In brief, after the SEC had referred the evidence on the pubic and consumer interest to the FPC as the agency properly responsible, the latter considered itself foreclosed from considering this evidence by the very act of the SEC in referring it over. The result of course was that the evidence and the pertinent issues which it raised were not considered at all. Their reasoning may satisfy the two Commissions but will be small comfort to the consuming public, which can reasonably expect that when Congress had enjoined both

Commissions to protect its interests one of them at least should have done so.

C. THE JOINT EFFECT OF THE ACTION OF THE TWO COMMISSIONS HAS BEEN TO SQUEEZE OUT THE INTERESTS OF THE PUBLIC AND CONSUMERS FROM CONSIDERATION BY EITHER OF THEM IN PASSING UPON TRANSACTIONS UNDER BOTH SECTION 12(d) OF THE HOLDING COMPANY ACT AND SECTION 203(a) OF THE FEDERAL POWER ACT.

Petitioner considers that the central issue in both these proceedings and the one to which it respectfully invites this Court's particular attention is raised by the fact that the sale to Electric & Gas was a transaction which required the express approval of both the SEC and FPC, who between them administer what the SEC calls "the component parts" of a "single statute" (SEC Brief Below, p. 21). This sale in its particular circumstances involved considerations which neither Commission has denied made its consummation inconsistent with, if not directly violative of, standards of public, consumer and investor interest which both Commissions concede are to be found *somewhere* in this "single statute." Nevertheless the sale was approved by both Commissions because neither would agree that these public policy considerations came within what it conceived to be its own narrow area of responsibility. Unless the plain language of Section 12(d) of the Holding Company Act and Section 203(a) of the Federal Power Act is meaningless in its reference to the public and consumer interest, one or both of the Commissions is obviously wrong and by their decisions the public and consumer interest has been abandoned by default. We consider it clear that both Commissions have erred and that both should have weighed the consierations bearing on the public interest. This error has been compounded by the judgment of the Court below affirming the Commissions' orders.

2. The United States Court of Appeals for the Fourth Circuit has decided an important question of State law in a way directly in conflict with applicable State decisions, i. e., by deciding that the *Creech* case bars the Petitioner's right to purchase in this situation when that question was expressly left open by the Supreme Court of South Carolina, and in so doing has departed from the rule laid down by this Court that whenever possible Federal Courts should leave matters of State law to the decision of the State Courts.

When the law of a State is uncertain because of the absence of a ruling by the Courts of that State, it has been held by this Court to be an abuse of discretion for an outside tribunal, including a Federal Court, not to refer the matter to the State Court for decision. *Railroad Comm.* v. *Pullman Co.*, 312 U. S. 496 (1941); *Gilchrist* v. *Interborough Rapid Transit Co.*, 279 U. S. 159 (1929); *Thompson* v. *Magnolia Petroleum Company*, 309 U. S. 478 (1940). The SEC in effect, and the Court below in terms, have gratuitously undertaken to decide the law of South Carolina and have decided it wrong.

Reference is made to the full statement appearing at pages 8 to 10 of the petition of the facts and circumstances of the *Creech* decision bearing upon the question of the Authority's legal right raised in the present case. There has been no decision of the Supreme Court of the State of South Carolina as to the Authority's legal right to purchase the Power Company or any other facility in its own area. The *per curiam* order of the Court denying rehearing in the *Creech* case, which is set forth at pages 9 and 10 of the petition shows this beyond possible doubt. The Court expressly declined to "go outside of the record" to pass upon the right of the Authority in such a situation. Bonham, C. J., who dissented from the *Creech* decision, in his separate statement expresses regret that the majority refused to grant this "alternative relief." Both he and the majority clearly considered that the decision had not included this question.

There can surely be no better authority on the point than the contemporary view of the Court which handed down the original *Creech* decision.

If the *Creech* case did not decide adversely the Authority's right to purchase facilities in its own area, then the only authoritative statement of the Authority's powers is that appearing in its enabling act. Section 8555-13(7) of that Act, set forth in full at page 8 of the petition, states flatly that the Authority is empowered to "*acquire* . . . power houses and any and all structures, ways and means, necessary, useful or customarily used and employed in the manufacture, generation and distribution of water power, steam electric power, hydro-electric power and any and all other kinds of power." This language is so unqualified and unequivocal that indeed it is hard to understand how the South Carolina Court was able to reach the conclusion it did, even in the circumstances of the *Creech* case. What is certain, however, is that the Court could not possibly have justified a finding of lack of power in that case except by reference to the limitations appearing in the language of Paragraph 21 of Section 8555-13 restricting the Authority's right to make "investigations, studies and considerations" to the area south of Columbia. (R-SEC 120; R-FPC 116.)

Furthermore, a denial of the Authority's right to make this purchase would not only do violence to the clear language of the statute, it would be in conflict with the established line of authority in other jurisdictions. A number of other States have statutes similar to the South Carolina act. In none of them has the State agency been denied the right to acquire existing generating and transmission facilities in its own area. In fact in Texas a narrower statute relating only to development of hydro-electric power and not mentioning steam facilities at all has been construed to allow a State authority to acquire a system with steam generation facilities to coordinate with its hydro-electric generation. *Guadalupe-Blanco River Authority* v. *City of San Antonio,* 145 Tex. 611, 200 S. W. 2d 989, 998 (1947).

In refusing a rehearing in the *Creech* case or to rule that the Authority was empowered to acquire utilities in its own area, the South Carolina Court was taking the most graceful way out of the situation that it could find, i.e., it avoided a direct retraction of the embarrassingly broad language of its opinion but at the same time it refused to make an indefensible application of that language by ruling against the Authority's right. The South Carolina Court certainly left the way open to a judgment favorable to the Authority when and if it should be called upon later to pass upon an acquisition in the Authority's own area. In the light of the statute and authorities, it is difficult to see how it could do otherwise than confirm the Authority's power to make such a purchase.

In the circumstances Petitioner submits that the SEC was unwarranted in its conclusion that the Authority's right was doubtful and that these "doubts" justified the management of Commonwealth in accepting an offer less favorable to its investors, consumers and the public. If possible doubt there was, its basis was so ephemeral, the possibility of harm to Commonwealth in the situation so remote and speculative, and the detriment to the public interest from sale to Electric & Gas so certain, that the action of the SEC can only be described as a gross abuse of discretion. Especially is this so when, as the record shows, the SEC could by ordering competitive bidding have made possible a court determination of the Authority's right without significant delay or prejudice to any party. (R-SEC 38, 39; R-FPC 23, 24.)

A fortiori the action of the Court below was the most glaring error. In affirming the order of the SEC, it found that the Commission's reasoning on this matter of "doubt" to be correct, *for the reason that the Supreme Court of South Carolina had decided that the Authority was without power to make this present acquisition.* The Court ignored the clear statement of the South Carolina Court that it had *not* decided the question in the *Creech* case, it disregarded the broad language of the statute as well as the prevailing

authorities in other jurisdictions, and finally it acted in direct violation of the instructions of this Court in the *Pullman* and other cases cited *supra*. By so disposing of the matter the Court below evidently hoped to avoid giving consideration to the errors of statutory misconstruction which lay at the heart of the decisions of both Commissions. The Court indeed hardly referred to the FPC opinion which contains no mention of the *Creech* case and whose decision did not turn upon that case in any degree.

3. This matter is not moot, nor is the Authority's equitable position impaired by laches.

Some of the respondents have argued below that this matter is moot for the reason that the sale to Electric & Gas was consummated before the Authority filed its petition for review or that the Authority has been guilty of laches in seeking judicial review of the orders complained of. Not all of the respondents made these contentions and they were ignored by the Court below which expressly denied that the matter had become moot. Nevertheless, since the same argument may be made again in opposition to this petition, it will be dealt with briefly.

As to mootness, the sole question is whether intervening events have put it beyond the power of the Court as a practical matter to undo what has been done. Otherwise, the mere fact that the transaction in question has been consummated prior to judicial review will not render the controversy moot. *The Chicago Junction Case*, 264 U. S. 258 (1924). The Court below, moreover, found that it did have the power to grant relief in this situation:

> "Motions have been made to dismiss both cases on the grounds that the contract for the sale of the stock has been carried out and that the cases have been rendered moot. We have no doubt, however, as to our power to order the parties to set aside the sale and restore the situation that existed prior to the entry of the orders if we thought them invalid for any reason. The power of the court to review orders of the Commissions and grant effective relief may not be defeated by

compliance with the orders. *The Chicago Junction Case,* 264 U. S. 258." (R-SEC 316; R-FPC 330)

As a practical matter the *status quo* in this case can be restored so that no party will be injured and some indeed will be benefitted. Thus, the continuing offer of the Authority for the stock of the Power Company is $1,400,000 more than the price paid by Electric & Gas. Commonwealth and its security holders can, therefore, be certain that on sale to the Authority they will be paid more than they have received. The corporate identity of the Power Company has been preserved and its stock can be returned to Commonwealth or transferred to another purchaser. Electric & Gas will receive back the purchase price which it paid and will be in a position to make an equitable settlement with those who have acquired its securities issued in connection with this transaction. Even as to underwriters' commissions and other expenses of the sale, the interim earnings of the Power Company are such that there will be no difficulty in satisfying any just claims of this character.

The SEC, Commonwealth and Electric & Gas in their briefs below have each charged the Authority with laches in failing to seek a stay of the Commissions' orders before appealing and in failing to give notice of intention to appeal The FPC did not join in this contention. The charge itself is unfounded and was ignored by the Court below in its opinion.

The Authority filed its petitions for review with the Court below within the times prescribed by Section 24 of the Holding Company Act, Section 313 of the Federal Power Act, and Section 10 of the Administrative Procedure Act, none of which conditions the right of judicial review upon notice or stay. Nor was there any requirement of equity. The parties were quite aware of the Authority's intentions. After the SEC order there was wide publicity in the press of Charleston and Columbia, South Carolina, to statements made on behalf of the Authority that it would not stop fighting "until all possibilities are exhausted" including, spe-

cifically, resort to the courts. This story even appeared in the house organ of Electric & Gas. (R-SEC 302; R-FPC 316.) Investors and underwriters were put on full notice by the prospectus of Electric & Gas dated May 11, 1948, in which the status of all proceedings was set forth and which carefully pointed out that the appeal periods had not expired. (R-SEC 303; R-FPC 317.) If any party had had *bona fide* doubts as to the Authority's intentions it could have inquired of the Authority. No such inquiry was ever made.

As to a stay, this is normally sought by a party who fears that its interests may be irreparably impaired if the threatened act takes place. Since the transaction could be undone and the *status quo* restored, the Authority had no such fear of irreparable injury. Besides which, quite frankly it did not believe that Commonwealth and Electric & Gas would be reckless enough to rush through the sale in the face of probable appeals.

If there has been any impairment of equities, it is of the position of the intervening respondents who acted with unseemly haste to conclude the sale before the Authority should appeal. There is not one jot of plausible evidence in the record to show why they could not have waited until the appeal periods had expired. In the circumstances one must conclude that these parties were making every effort to defeat the jurisdiction of the Federal Courts by presenting them with what was hoped to be a *fait accompli.*

VI.

CONCLUSION.

For the foregoing reasons it is respectfully submitted and urged that the petition for writs of certiorari should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 590.

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY, *Petitioner*,

v.

SECURITIES AND EXCHANGE COMMISSION, and THE COMMONWEALTH & SOUTHERN CORPORATION.

No. 591.

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY, *Petitioner*,

v.

FEDERAL POWER COMMISSION and SOUTH CAROLINA ELECTRIC & GAS COMPANY.

On Petition for Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit.

PETITIONER'S REPLY BRIEF.

In reply to the opposition briefs of the Government and of the intervening respondents, Petitioner respectfully calls the attention of the Court to the following matters:

1. The Construction of the Creech Case by the Court Below.

The Government states (Government Brief, p. 12) that "Neither the SEC nor the Court below purported to decide the State law;" This contention is also made by Commonwealth (Commonwealth Brief, pp. 10 and 11). These

Respondents argue that the Court below merely sustained the position of the SEC that the effect of the *Creech* case was to cast substantial doubt upon the Authority's right to purchase in the circumstances of the instant case. The Court below did sustain the SEC's position but the point is that the Court below did so *because of an erroneous decision of State law,* namely, that by the *Creech* decision "the question of the right of the Authority to acquire the property of another power company has been squarely decided against it." (R-SEC 315; R-FPC 329; Petitioner's Brief, p. 40) This was beyond question a decision of State law. It was also clearly wrong.

2. The Action of the Two Commissions.

In the face of the express admission of both Commissions that they excluded from consideration the most important relevant evidence before them bearing upon the public interest, the Government and Commonwealth contend that in fact they weighed this evidence fully. (Government Brief, pp. 15-18; Commonwealth Brief, pp. 13-16.) It is clear, however, from the Government's own review of the action of the two Commissions (Government Brief, pp. 13-18) that they did not consider this evidence and felt justified in refusing to consider it because they regarded the Authority's offer as not being an available alternative—the SEC because of its unwarranted assumption that the Authority was disqualified by the *Creech* decision, the FPC because it considered the Authority disqualified by the action of the SEC. Both Commissions, moreover, so construed their statutes that neither was left with responsibility to protect the public and consumers. The error of the two Commissions was not in how they weighed the evidence which they considered, but in failing to consider the most important relevant evidence before them. (Petitioner's Brief, pp. 28-37.) If either Commission had considered the facts bearing on the public interest, it would certainly have reached the opposite conclusion.

3. The Functions of the Commissions and of Management.

Both the Government and Commonwealth say that in effect the Authority would have the two Commissions substitute their judgment for the judgment of Commonwealth's management. (Government Brief, pp. 14, 15; Commonwealth Brief, p. 15.) This is not the case. The Authority does believe that when, as here, the management has proposed a transaction which is not in the public interest and which will be injurious to consumers, the Federal Commissions are required by their Acts to disapprove it. The record shows that there are a number of available alternatives to sale to Electric & Gas, e.g., sale to the Authority or distribution of the Power Company's stock to Commonwealth's stockholders or sale to a third purchaser, any one of which would be far more in the public interest than sale to Electric & Gas. If this sale is ultimately disapproved the management can propose any one of these alternatives and it should properly be approved if the Commissions find it to be in the public interest.

4. The Action of South Carolina Commission.

Both the Government and the Commonwealth briefs make much of the fact that the South Carolina Public Service Commission approved the issuance by Electric & Gas of the securities necessary to finance the acquisition and purported to approve the entire transaction. (Government Brief, p. 16; Commonwealth Brief, p. 14.) To this it may be said, first, that the action of the South Carolina Public Service Commission did not relieve either Federal Commission of its plain duty to consider and weigh independently all of the relevant evidence before it. In the second place, a perusal of the proceedings before the South Carolina Commission leaves no doubt that that Commission was affected by extreme bias and was understandably loath to lose its jurisdiction over the Power Company, which it would have lost upon acquisition by the Authority. Third,

the South Carolina Commission did not in fact consider the alternative of sale to the Authority. (See TR-SCPSC Vol. 5 pp. 101-106 and Order of South Carolina Public Service Commission of December 23, 1947, set out at R-SEC 98-101 and R-FPC 102-105.) Finally, while the Federal Commissions might have given weight to the State Commission's action it is obvious from their opinions that neither thought it was worthy of much consideration.

5. The Public Ownership Issue.

Commonwealth has sought without warrant to interject in these proceedings the issue of public versus private ownership. (Commonwealth Brief, pp. 14, 15.) The Authority does not and has not at any time asked any special consideration for its position on the grounds that it is a public body or that acquisition by it of the Power Company would bring the latter into public ownership. It has contended throughout that both Federal Commissions should have disapproved the sale to Electric & Gas solely on the grounds that in the particular circumstances of this particular situation, in the light of such objective considerations as power supply, financial condition, etc., the public interest would be injured by sale to Electric & Gas and would be infinitely better served by acquisition by the Authority. It is true that the Authority does conceive its obligation to the public with respect to the publicly financed power which it produces as requiring it to take every means at its disposal to see that this power comes to the consumers as cheaply as possible. But it has never insisted that this result be achieved through public ownership if it could be assured in any other way. As proof of its willingness to accept another way it offered in the proceedings before the South Carolina Commission to withdraw its opposition entirely if Electric & Gas would promise, as the Authority has promised, an immediate 10% rate reduction to the Power Company's consumers. (R-SEC 76, 77; R-FPC 61, 62.) Electric

& Gas refused this offer. As a consequence of its refusal, the Authority has had no alternative but to press its claims as the party making by far the most advantageous offer for the property from the point of view of all interested groups —consumers, investors and the public.

6. Why Competitive Bidding Should Have Been Ordered.

The Government (Government Brief, p. 14) argues that there would have been no different result if competitive bidding had been required under the SEC's Rule U-50. The reason why competitive bidding should have been ordered is that, as the record shows, (R-SEC 38, 39; R-FPC 23, 24; TR-SEC 169, 170) an order for competitive bidding was the only way, after Commonwealth had refused to make an agreement with the Authority, whereby under South Carolina law a case of genuine controversy could have been stated wherein the right of the Authority to purchase would be conclusively settled. (Petition, p. 11.) By refusing to order competitive bidding the SEC denied the Authority the right to establish its qualifications beyond question. In view of all that was at stake for the interested public and consumers, the SEC's refusal amounted to an abuse of discretion.

WHEREFORE, it is respectfully submitted that the petition for writs of certiorari should be granted.

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	3
Statutes involved	3
Statement	4
Argument	12
Conclusion	19
Appendix	20

CITATIONS

Cases:

Ayrshire Corp. v. *United States*, 335 U. S. 573	18
Creech v. *South Carolina Public Service Authority*, 200 S. C. 127	7, 12
Federal Communications Commission v. *WOKO*, 329 U. S. 223	16
Federal Power Commission v. *Hope Natural Gas Co.*, 320 U. S. 591	18
Federal Trade Commission v. *Morton Salt Co.*, 334 U. S. 37	16
Jersey Central Co. v. *Federal Power Commission*, 319 U. S. 61	6
National Labor Relations Board v. *Donnelly Co.*, 330 U. S. 219	16
National Labor Relations Board v. *Link-Belt Co.*, 311 U. S. 584	18
Pacific Power & Light Company v. *Federal Power Commission*, 111 F. 2d 1014	17
Pittsburgh Glass Co. v. *National Labor Relations Board*, 313 U. S. 146	16
United States v. *Detroit Navigation Co.*, 326 U. S. 236	18

Statutes:

Act No. 887 of the Acts of the General Assembly of South Carolina for 1934 (38 S. C. Stat. at Large, p. 1507; Secs. 8555-11 through 8555-24, Chapter 163-B, Code of Laws of South Carolina, 1942)	4
Federal Power Act, 41 Stat. 1063, as amended by 49 Stat. 838, 16 U. S. C. 791a-825r:	
Section 201	20
Section 203	3, 6, 10, 21
Section 313	2, 18, 22

Statutes—Continued Page

Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. 79, *et seq.*:

Section 11 (b) 4
Section 11(e) 3, 7, 25
Section 12(d) 3, 5, 7, 14, 15, 26, 28
Section 24 ..... 2, 26

Miscellaneous:

SEC Rules:

U-44 ..... 4, 7, 28
U-50 ..... 4, 7, 8, 14, 28

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 590

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY,
PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION AND THE COMMONWEALTH AND SOUTHERN CORPORATION

No. 591

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY,
PETITIONER

v.

FEDERAL POWER COMMISSION AND SOUTH CAROLINA ELECTRIC & GAS COMPANY

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION AND THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (R.-FPC. 324-330,

R.-SEC. 310-316)[1] is reported at 170 F. 2d 948. The order of the Federal Power Commission (R.-FPC. 2-10) is not yet reported.[2] The findings and opinion of the Securities and Exchange Commission (R.-SEC. 2-25) have not yet been reported but are set forth in Holding Company Act Release No. 8080.

JURISDICTION

The judgment of the Court of Appeals was entered on November 10, 1948 (R.-FPC. 331, R.-SEC. 317). By an order of the Chief Justice dated January 25, 1949, the time for filing a petition for writs of certiorari was extended to and including February 23, 1949 (R.-FPC. 333, R.-SEC. 319). The petition for writs of certiorari was filed on February 23, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), Section 313(b) of the Federal Power Act, and Section 24(a) of the Public Utility Holding Company Act of 1935.

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[1] The form of reference to the records in these two cases, adopted by the petitioner (Pet. 2, note 3), will be followed in this brief.

[2] With the consent of the court below, the record certified to it by the Federal Power Commission incorporated by reference the proceedings before the Securities and Exchange Commission and the Public Service Commission of South Carolina (R.-FPC. 296-297). The entire transcript so certified is on file with the Clerk of this Court but, by stipulation of the parties, the printed record in this Court consists solely of the appendices to the briefs of the parties in the court below. The record before this Court in No. 590, the SEC case, contains all of these materials.

QUESTIONS PRESENTED

The Securities and Exchange Commission ordered the Commonwealth and Southern Corporation to divest itself of the ownership of the stock of the South Carolina Power Company. South Carolina Electric and Gas Company offered to buy the Power Company stock and the South Carolina Public Service Authority made a higher offer but one which was dependent on a judicial determination of its power to make such a purchase. Commonwealth and Southern decided to accept the Electric & Gas Company's offer. It applied for the approval of the Securities and Exchange Commission and the Electric & Gas Company applied for that of the Federal Power Commission. The questions presented are:

1. Whether it was within the discretion of the Securities and Exchange Commission, under Sections 11(e) and 12(d) of the Public Utility Holding Company Act, to approve the proposed disposition of the Power Company stock to the Electric & Gas Company.

2. Whether the Federal Power Commission, under Section 203(a) of the Federal Power Act, properly approved, as "consistent with the public interest", the acquisition by the Electric & Gas Company of the Power Company stock.

STATUTES INVOLVED

The pertinent provisions of the Federal Power Act, 41 Stat. 1063, as amended by 49 Stat. 838, 16

U.S.C. 791a-825r, and of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U.S.C. 79, *et seq.* are set forth in the Appendix, *infra*, pp. 20-28. S.E.C. Rules U-44 and U-50 are also set forth in the Appendix, *infra*, pp. 28-29.

STATEMENT

On August 1, 1947, the Securities and Exchange Commission, acting under Section 11(b)(1) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79k(b)(1) ordered the Commonwealth and Southern Corporation (Commonwealth), a registered public utility holding company under that Act, to divest itself of the ownership of the stock of South Carolina Power Company (Power) (R.-SEC. 6, 4). In accordance with that order, and after information that Commonwealth proposed to sell these properties in compliance with the SEC order had been widely disseminated (R.-SEC. 162, 172), Commonwealth negotiated for the sale of Power stock with two prospective purchasers operating in South Carolina, *i.e.*, South Carolina Public Service Authority (Authority), petitioner herein, a quasi-public corporation of that State,[3] and South Carolina Electric & Gas Company (Electric & Gas), a privately owned public utility. Only the Authority

[3] Authority was created by Act No. 887 of the Acts of the General Assembly of South Carolina for 1934 (38 S. C. Stat. at Large, p. 1507; Secs. 8555-11 through 8555-24, Chapter 163-B, Code of Laws of South Carolina, 1942) set out at R.-FPC. 111-128.

and Electric & Gas had evidenced interest in the acquisition of the shares in Power (R.-SEC. 153, 162, 166-173). Negotiations between Authority and Commonwealth failed because Authority refused to accept the restrictive conditions sought to be imposed by Commonwealth, Commonwealth doubted Authority's power to purchase the stock, and Commonwealth was desirous of avoiding "a competitive publicly operated threat to the neighboring southern companies remaining subsidiaries of this corporation" (R.-FPC. 5, 87-91, R.-SEC. 196-197). Accordingly, notwithstanding Authority's higher offer of $11,600,000, which was subject to obtaining an underwriting, which in turn was subject to securing a ruling from the courts of South Carolina that Authority had power under South Carolina law to acquire the stock, Commonwealth contracted to sell the stock to Electric & Gas for a price of $10,200,000 subject to closing adjustments (R.-FPC. 5, 33-37, 47-56, 106-109).

The proposed sale of stock by Commonwealth to Electric & Gas involved three distinct but related transactions, each requiring a regulatory agency's approval: (1) the disposition of the stock by Commonwealth, a registered holding company, was subject to the Securities and Exchange Commission's approval under Section 12(d) of the Public Utility Holding Company Act; (2) the acquisition of the stock by Electric & Gas, a public utility under the Federal Power Act, required the Federal Power

Commission's approval under Section 203 of that Act;[4] and (3) the issuance of securities by Electric & Gas to finance the acquisition required the South Carolina Public Service Commission's approval.

The South Carolina Public Service Commission, on November 6 and December 23, 1947, approved Electric & Gas' application for authority to issue securities to finance the acquisition of the stock (R.-FPC. 2-3, 102-105). In so approving, that Commission found that as a result of the acquisition, Electric & Gas would be in a stronger financial position, that together the two companies would have sufficient generating facilities to provide an adequate power supply to serve both territories in the near future, and that Electric & Gas would have sufficient credit and financial strength to obtain any funds necessary for further expansion (R.-FPC. 103-104). It further was of the opinion that the acquisition would not prejudice customers of Power as to rates (R.-FPC. 104). An appeal by certain "objectants" to the Court of Common Pleas, Richland County, South Carolina, was dismissed on April 3, 1948, and an appeal to the South Carolina Supreme Court was dismissed on May 14, 1948 (R.-FPC. 301).

On March 25, 1948, the Securities and Exchange Commission approved Commonwealth's disposition of the stock to Electric & Gas (R.-SEC. 26-

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[4] Cf. *Jersey Central Co.* v. *Federal Power Commission*, 319 U. S. 61, 72-78.

29).[5] It found that there were only two interested purchasers and that one of these, Authority, required judicial clarification of its right to buy the stock. As to the latter circumstance, it noted that *Creech* v. *South Carolina Public Service Authority,* 200 S. C. 127, cast doubt on Authority's power to acquire the common stock of Power (R.-SEC. 14-17), that underwriters had advised the Authority of their unwillingness to purchase and distribute the Authority's bonds until this doubt had been removed through a court test (R.-SEC. 17), that a substantial period of time might be necessary to resolve that doubt (R-.SEC. 17-18, 19, 20), and that Authority's failure to receive a prompt and favorable decision might well result in Electric & Gas' being the only bidder (R.-SEC. 20). This, the Commission found, would not only injure Commonwealth's bargaining power in any subsequent negotiations but would involve cash stringency in view of the pending construction program of the Commonwealth system (R.-SEC. 20). It further noted that Authority's objections to the proposed transaction on the grounds that it was not in the public interest, or for the benefit of consumers or

---

[5] Commonwealth's application for approval was filed under Section 12(d) of the Holding Company Act and SEC Rule U-44. Application was also made for exemption from the competitive bidding requirements of Rule U-50.

The application was also filed as a plan under Section 11(e) of the Holding Company Act, and the plan was approved by the SEC as "fair and equitable" within the meaning of that Section.

investors, were made before, and rejected by, the South Carolina Commission (R.-SEC. 21-22). It granted the requested exemption from the competitive bidding requirements of its Rule U-50(b) and approved the proposed disposition of the Power stock by Commonwealth, finding that the management of Commonwealth was warranted in accepting the offer of Electric & Gas, that the public invitation of sealed bids was inappropriate, and that the price offered by Electric & Gas was not unreasonable (R.-SEC. 2-25). The SEC stated that nothing in its decision was to be construed as affecting or limiting the jurisdiction of the Federal Power Commission (R.-SEC. 22).

Meanwhile, on November 19, 1947, Electric & Gas applied to the Federal Power Commission for authorization and approval of its acquisition of Power's stock (R.-FPC. 2). The Authority, the Federal Works Agency, and the City Council of Charleston, South Carolina were allowed to intervene (R.-FPC. 2-3). The records in the proceedings before the State Commission and the Securities and Exchange Commission were, by agreement of counsel, incorporated in, and made part of, the Federal Power Commission's record (R.-FPC. 3). On this record, the Federal Power Commission, on April 29, 1948, made the finding required by the statute that the acquisition was "consistent with the public interest" and granted Electric & Gas'

application. In reaching that result, it found (R.-FPC. 8-9):

> The systems of [Electric & Gas] and the Power Company are interconnected and their operation will be integrated as a result of the stock acquisition. Integration of the properties will permit more efficient and better utilization of existing transmission facilities. Completion of construction initiated by the Power Company will create an additional transmission line so as to enable loop operation between the eastern and western load centers of the integrated properties. Additional operating benefits and economies can flow from the use of the most efficient steam plants to carry the base load, thereby permitting accumulation of storage in hydro projects to carry peak loads. Integration of the properties will diminish the reserve capacity required to maintain service, as the indicated reserve required for the integrated properties would be practically the same as that for the separate properties independently operated. It is reasonable to conclude that some benefits may be derived from the consummation of the proposed acquisition.

It noted that by an amendment to the application, Electric & Gas undertook to write off, by charges to earned surplus and future earnings, the excess of the amount it would pay for the stock over the original cost (less depreciation) of the underlying assets.

As to Authority's contention that Electric & Gas' application should be denied because of Authority's alleged superior offer, the Commission noted that it had only limited jurisdiction in the premises, *i.e.*, that the statutory standard provided in Section 203(a) was that the proposed acquisition merely be "consistent with the public interest," and commented (R.-FPC. 7):

> Granted such a proposal, or some other plan not presently before us, might be better in certain aspects, nevertheless that fact is insufficient to support a finding that the proposal formally before us is not consistent with the public interest.

Authority's application for rehearing being deemed denied by reason of the Power Commission's failure to act thereon within thirty days after filing, Authority petitioned the court below for review of the Commission's order together with that of the Securities and Exchange Commission (R.-FPC. 273-283, R.-SEC. 261-274). That court was of the opinion that both the Federal Power Commission and the Securities and Exchange Commission had fully considered Authority's various contentions and had found nothing in them requiring that the sale to Electric & Gas be disapproved. It further held that "There is abundant evidence that the sale is fair to all parties, that it will result in divesting Commonwealth and Southern of all control over the property and that the ownership

by Electric and Gas is consistent with the proper and economical development of an adequate supply of electrical energy in the territory. Under such circumstances we are bound by the findings of the Commissions approving the sale and purchase as in the public interest" (R.-FPC. 330). Accordingly, it affirmed (R.-FPC. 330).[6]

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[6] At the same time that it affirmed the orders of the SEC and of the FPC, the court below denied motions made by Commonwealth in the SEC case and by Electric & Gas in the FPC case that the petitions for review be dismissed for mootness (R.-FPC. 330). The petitioner had made no application to the court below for a stay, and the companies, almost two months after entry of the SEC's order, had proceeded to consummate the transaction. This involved not only a transfer of the Power Company to Electric & Gas, but also, since Electric & Gas needed to raise some of the necessary funds through a public offering of securities, it sold some $6,000,000 in new stock to thousands of investors upon the basis of a prospectus which described the purpose of the financing to be the acquisition of the Power Company (R.-SEC. 283-99).

The private companies argued that under the circumstances the controversy was moot. The SEC, on the other hand, expressed the view that the mere consummation, in the absence of a stay, of a transaction requiring Commission authorization does not preclude a reviewing court from ordering restoration of the status quo where the administrative authorization is found to be improvident and such relief is practicable and consistent with the equities of the case; under the facts then before the Court, however, the SEC argued that even if its order were deemed erroneous the court should not undertake to undo the transaction in view of the fact that the rights of innocent third parties had intervened in such a way that there appeared to be no practical and equitable method of restoring the status quo. Since the court found the orders of the two Commissions to be proper, it did not reach this question, holding only, as we understand its opinion, that consummation did not deprive it of jurisdiction to affirm. With this holding we, of course, agree.

ARGUMENT

The petition here is premised on the assumption that the Authority offered an alternative proposal to purchase the stock of Power more beneficial to the public interest. But no such superior alternative in fact existed. The South Carolina Supreme Court in *Creech* v. *South Carolina Public Service Authority,* 200 S. C. 127, at the very least had cast substantial doubt on Authority's power to purchase the stock, and, indeed, as read by the court below (R.-FPC. 326-329), that decision denies any such power to Authority. Neither the SEC nor the court below purported to decide the state law; the issue before them was merely one of fact—or judgment—as to whether the state law was doubtful with respect to the Authority's power to buy. The suggestion now made by the petitioner (Pet. 38) that the issue of state law should have been left to decision by the state courts in a test case simply begs the issue of fact (or judgment) which was before the SEC: whether the chance that such a course would result in a ruling upholding the Authority's power to purchase the stock in question was sufficient to warrant rejection of Commonwealth's proposal for authorization to accept the only firm offer—that of Electric and Gas.

Not only was an alternative purchaser not available immediately (the South Carolina Supreme Court, as the court below and the SEC recognized

(R.-SEC. 313-315), might, of course, have reversed, modified or distinguished its holding in subsequent litigation), but in addition, it is clear that Commonwealth was not willing to sell the stock to Authority. While there had been prior negotiations between Authority and Commonwealth involving offers and counter-offers, all subject to seeking additional judicial declarations as to Authority's power to purchase the stock, these offers had not resulted in any contract or concrete proposal. Commonwealth finally had refused to sell to Authority both because of doubt as to Authority's legal capacity to purchase and because Authority is a public power authority and an agency of the State of South Carolina. The so-called "superior proposal" was nothing more than, on the one hand, a desire to purchase on the part of Authority which had, at best, doubtful power to make the purchase, and, on the other, no reciprocal desire on the part of Commonwealth to make the sale.

1. In the light of the facts that the SEC did not have before it for consideration any real and immediate alternative to the sale by Commonwealth to Electric & Gas, and that the South Carolina Public Service Commission, on a record which was made part of the record before the SEC (R.-SEC. 22, note 21), had, after lengthy hearings, approved the purchase by Electric & Gas of Power's common stock and the issuance of securities to finance the purchase in the face of the same objections as are

now made by the Authority, it is perfectly clear that the SEC acted well within its discretion when it approved the proposed sale.[7]

That the Commonwealth management was motivated, in part, by the desire to avoid public ownership competition to its subsidiaries in adjoining States (Pet. 6-7) was not a fact which precluded SEC approval of the sale to Electric and Gas. As the SEC concluded in its Findings and Opinion (R.-SEC. 19), it was not called upon to "approve or disapprove the management's reasons for fol-

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[7] The SEC's Rule U-50, promulgated in part under Section 12(d), provides that a registered holding company or subsidiary thereof, desiring to sell securities, shall publicly invite sealed written bids for the purchase or underwriting of such securities. An exemption from the Rule is available where such procedure is not necessary, *inter alia*, "to assure the maintenance of competitive conditions" or "the receipt of adequate consideration." Under the circumstances of this case, as the SEC held (R.-SEC. 12-14), the device of publicly inviting sealed bids was obviously unnecessary to fulfill the purposes of the Rule or of Section 12(d). It is undisputed that, despite advance publicity of Commonwealth's intention to dispose of its interest in Power, the only interested purchasers were the Authority and Electric & Gas. In effect, the bids were already in, and the only question was whether Commonwealth should be compelled to surrender a "bird in the hand" for a "bird in the bush." There is nothing in the Rule requiring acceptance of a high bid notwithstanding doubt as to the bidder's legal capacity to consummate the transaction, and the Commission has never so construed it.

In actual practice under Rule U-50, a seller requires prospective bidders to submit in advance of the actual bidding certain data from which an appraisal may be made of their qualifications to bid. When the bids are in, the seller chooses what it deems the highest qualified bidder, subject to the surveillance of the SEC, which uniformly reserves jurisdiction in Holding Company Act proceedings to pass upon the results of competitive bidding. Thus, had the machinery of formal competitive bidding actually been used in this case, the consequences would have been no different.

lowing one course of action rather than another. Whatever questions we may have as to Commonwealth's motivation, the problem before us is whether the facts of record indicate compliance or noncompliance with the applicable statutory requirements." See Section 12(d) of the Holding Company Act, Appendix, *infra*, p. 26. Any other rule would render unworkable a statute which subjects to SEC jurisdiction virtually every significant financial transaction on the part of a public utility holding company or a subsidiary. Since it was objectively ascertainable on the record that there was a serious question as to the petitioner's authority to buy, and since the South Carolina Public Service Commission had approved the transaction, the SEC's determination, that the decision of Commonwealth's management to accept the Electric & Gas offer did not violate any standards of the Act, is invulnerable.

The practical situation which confronted the SEC and the court below, and which now confronts this Court, makes it unnecessary to consider the nature of the SEC's duty under Section 12(d) of the Holding Company Act, much discussed by the Authority (Pet. 28-32). The SEC did not, as the Authority contends, ignore the interests of the public and consumers. In stating that its decision was without prejudice to consideration by the Federal Power Commission of whether the proposed acquisition is in the public interest, the SEC did not abdicate its function of considering the

public interest as it would be affected by the proposed sale.[8] Its reference to the hearings before, and decision by, the South Carolina Public Service Commission (R.-SEC. 21-22) was obviously made in response to the Authority's arguments in this connection. It felt impelled to do no more because of its "grave doubt concerning the Authority's ability to acquire the common stock of Power" (R.-SEC. 19), and that administrative judgment was within its discretionary power. That the proposed sale was not in disregard of the interests of the public and the consumers appeared from the decision of the South Carolina Public Service Commission. The SEC was thus free, under the circumstances, to treat the problem as one in which at least minimal protection to those interests was sufficient basis for approval when withholding approval would result in "real danger to Commonwealth" (R.-SEC. 19).[9]

2. Much the same considerations serve to dispose of the Authority's attack on the order of the Federal Power Commission (Pet. 33-37). Whether the

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[8] The SEC certainly did not abuse its discretion in leaving the FPC free to consider the effect of the proposed acquisition on the public interest. Electric & Gas was not subject to the SEC's jurisdiction and was, as a public utility company, subject to that of the FPC. As we show, *infra*, pp. 17-18, the FPC gave full and complete consideration to the public interest as it impinged upon the acquisition.

[9] Cf. *Federal Communications Commission* v. *WOKO*, 329 U.S. 223, 228-229; *National Labor Relations Board* v. *Donnelly Co.*, 330 U.S. 219, 235; *Pittsburgh Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 156-163; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 50.

Federal Power Act requires the Commission to weigh alternative proposals and choose the more advantageous to the public is certainly not involved in this case for, as we have shown, there was no real and immediate alternative to Electric & Gas' offer to purchase.[10]

We do not understand the Authority to quarrel with the Power Commission's position that it is not obliged to weigh the merits of a proposed plan with others which might have been, or might be, but were not, actually real alternatives. If it means nothing else, the decision of the Court of Appeals for the Ninth Circuit in *Pacific Power & Light Company* v. *Federal Power Commission*, 111 F. 2d 1014, 1016, holding that "The phrase 'consistent with the public interest' [in Section 203(a) of the Power Act] does not connote a public benefit to be derived or suggest the idea of a promotion of the public interest. The thought conveyed is merely one of compatibility", means that the Power Commission is not obliged to decide that the proposed plan is the best of all conceivable, albeit unavailable plans.

In this case, the Power Commission not only found that the proposed transaction would be "consistent with the public interest"; it went further and found that affirmative benefits would result (R.-FPC. 8-9). See, *supra*, pp. 8-10. In so doing,

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[10] The illusory nature of an alternative purchase by Authority was underlined for the Federal Power Commission by the fact that the SEC had not approved a sale to Authority.

the Commission rejected Authority's contention, previously advanced before, and rejected by the South Carolina Commission (R.-FPC. 103-104) and renewed here again (Pet. 31, 33), that the record "showed overwhelmingly that the effect of this transfer" would result in impairment of a public utility's ability to render adequate service. This contention is premised on the existence of a claimed "superior proposal", but that illusory proposal aside, Authority does not question, and the court below found (R.-FPC. 330), that the Commission's findings are supported by substantial evidence. Accordingly, these findings, including the finding of resulting affirmative benefits, were properly treated by the court below as conclusive and binding. Section 313(b) of the Federal Power Act, Appendix, *infra*, pp. 23-25; see also *Ayrshire Corp.* v. *United States*, 335 U. S. 573, 592-593; *United States* v. *Detroit Navigation Co.*, 326 U. S. 236, 241; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 596, 597.

CONCLUSION

The decision below is correct, and there is no conflict of decisions. It is respectfully submitted, therefore, that the petition for writs of certiorari should be denied.

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MARCH, 1949.

APPENDIX

The pertinent provisions of the Federal Power Act, 41 Stat. 1063, as amended by, 49 Stat. 838, 16 U.S.C. 791 a—825 r, are as follows:

SECTION 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the gen-

eration of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

SEC. 203. (a) No public utility shall sell, lease, or otherwise dispose of the whole of its

facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so. Upon application for such approval the Commission shall give reasonable notice in writing to the Governor and State commission of each of the States in which the physical property affected, or any part thereof, is situated, and to such other persons as it may deem advisable. After notice and opportunity for hearing, if the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same.

(b) The Commission may grant any application for an order under this section in whole or in part and upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may from time to time for good cause shown make such orders supplemental to any order made under this section as it may find necessary or appropriate.

SEC. 313. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding

under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the

court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to re-

view by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

The pertinent provisions of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U.S.C. 79, *et seq.*, are as follows:

SEC. 11(e). In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate

the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan * * *.

SEC. 12(d). It shall be unlawful for any registered holding company, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to sell any security which it owns of any public-utility company, or any utility assets, in contravention of such rules and regulations or orders regarding the consideration to be received for such sale, maintenance of competitive conditions, fees and commissions, accounts, disclosure of interest, and similar matters as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder.

SEC. 24(a). Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof de-

signated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order

of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

Rule U-44, promulgated under Section 12 (d) of the Act, as well as under other sections not here relevant, provides in pertinent part as follows:

(a) *Sales of utility securities or assets.*—No registered holding company shall, directly or indirectly, sell to any person any security which it owns of any public-utility company, or any utility assets, except pursuant to a declaration notifying the Commission of the proposed transaction, which has become effective in accordance with the procedure specified in rule U-23, and pursuant to the order of the Commission with respect to such declaration under the applicable provisions of the Act.

Rule U-50, promulgated under Section 12 (d) of the Act, as well as under other sections not here relevant, provides in pertinent part as follows:

(a) *Scope of rule.*—This rule is applicable to every declaration and application regarding the issuance or sale of any securities of, or owned by, any registered holding company or subsidiary company thereof except * * * (5)

The issuance or sale of securities as to which the Commission finds that compliance with paragraphs (b) and (c) hereof with respect to such issuance or sale is not * * * (c) necessary or appropriate in the public interest or for the protection of investors or consumers to assure the maintenance of competitive conditions, the receipt of adequate consideration or the reasonableness of any fees or commissions to be paid with respect to sales of securities subject to section 12 (d) of the Act.

(b) *Public invitation of proposals.*—The Commission will not grant or permit to become effective any application or declaration subject to this rule unless the applicant or declarant, at least 10 days prior to entering into any contract or agreement for the issuance or sale of the securities therein proposed, shall have publicly invited sealed written proposals for the purchase or underwriting of such securities and has complied with paragraph (c) hereof. Such proposals as may be received in response to such invitation shall not be opened at any time or place other than as specified in the invitation.

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October Term, 1948

No. 591

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY,
PETITIONER,

versus

FEDERAL POWER COMMISSION AND SOUTH CAROLINA ELECTRIC & GAS COMPANY.

BRIEF IN OPPOSITION TO CERTIORARI ON BEHALF OF INTERVENER SOUTH CAROLINA ELECTRIC & GAS COMPANY

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TABLE OF CONTENTS

Subject Matter Index

PAGE

Statement:

History of Proceeding Below 1

The Facts as to the Closing 5

The Negotiations Between Commonwealth and the Authority were Res Inter Alios Acta as to Electric and Gas 6

The Creech Case, 200 S. C. 127, 20 S. E. (2) 645 7

The Second Ratio Decidendi of the Creech Case 10

Public Interest Considerations 12

Argument:

I.

As to the Construction of Section 203 (a) of the Federal Power Act:

A. The Authority's Contention 15

B. The Contention of Electric & Gas 16

II.

Offers Not binding on Authority:

A. Offer to Buy Stock 18

B. The Offer of a Ten Percent Rate Reduction. 20

III.

The Moot Question 21

Conclusion 21

TABLE OF AUTHORITIES

Cases Cited

PAGE

Carolina National Bank v. State of S. C., 60 S. C. 465, 38 S. E. 629 19

Creech v. South Carolina Public Service Authority, 200 S. C. 127, 20 S. E. (2) 645 ..... 7, 16

Pacific Power & Light Co. v. Federal Power Commission 98 F. (2) 835—affirmed 307 U. S. 156, 83 L. Ed. 1180. 16

Statutes Cited

Authority's Enabling Act of 1934 (Sections 8555-11 to 8555-24, Code of S. C., 1942) 9, 10, 20

Federal Power Act of 1935 (16 U. S. C. A. 791 et seq.).. 3

Section 201 (f) 21

Section 203 (a) 15, 16

South Carolina Regulatory Act of 1932 (Sections 8555-1 to 8555-8, Code of S. C., 1942) 3

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BRIEF IN OPPOSITION TO CERTIORARI ON BEHALF OF INTERVENER SOUTH CAROLINA ELECTRIC & GAS COMPANY

STATEMENT

History of Proceedings Below

South Carolina Electric & Gas Company, later referred to as Electric & Gas, was formerly an operating company in the Associated Gas and Electric System. Following the bankeruptcy of that system the common stock of Electric & Gas was vested in General Public Utilities Corporation of New York and, in compliance with orders of the S. E. C., was distributed as a dividend by that Corporation

in November, 1946. As a result, Electric & Gas then had approximately thirty-seven thousand stockholders, widely scattered throughout the country. A board of directors was then elected, consisting entirely of citizens and residents of South Carolina living in its service area. The directors not connected with the company are successful and respected business men of their respective communities. It is an entirely independent, privately owned utility company. Prior to its acquisition of the stock of South Carolina Power Company, later referred to as Power Company, there was absolutely no connection between it and any holding company or other utility. There is no one stockholder or group of stockholders owning enough of the common stock to control the company (R. 184-185, 205-206).

Electric & Gas introduced as Exhibit 22 before the state commission a map published by the state commission showing transmission lines in South Carolina. This is colored in green covering the territory served by Electric & Gas and in purple covering the territory served by Power Company, with the transmission lines in both territories emphasized in red. This map shows at a glance various physical facts leading to the conclusion that the then proposed integration between the two companies was a "natural," just as the Authority claimed that the proposed integration between it and Power Company would be. The map shows that the service area of Electric & Gas extends into ten, and that of Power Company into fourteen counties. At the time that the Authority was created in 1934 and prior thereto and since the two companies have together been serving twenty-four out of the total of forty-six counties of South Carolina.

Electric & Gas has its principal office in the capital City of Columbia and Power Company has its in the City of Charleston. Both are subject to the jurisdiction of the state

commission under the comprehensive regulatory statute adopted in South Carolina in 1932, which is now codified as sections 8555-1 to 8555-8 of the Code of South Carolina of 1942. Both are also subject to the jurisdiction of the F. P. C. under the Federal Power Act of 1935, 16 U. S. C. A. 791 *et seq.*

Electric & Gas first secured authority from the state commission to issue the securities to raise the money to pay for the stock, as required by the regulatory act of 1932, as the result of a proceeding in November-December, 1947. The Mayor and the City of Charleston, and the state Senator from and the County of Charleston (later called the Charleston Group) intervened as protestants before the state commission, as did the Authority and others. The Charleston Group and the Authority took an active and vigorous part throughout the proceeding. The state commission sat for eight days; 39 witnesses were sworn, making a transcript of some 1195 pages, and some 45 exhibits were introduced. The state commission issued its order No. E-578 on December 23, 1947, confirming its original order No. E-576, which approved the application of Electric & Gas (R. 259).

On the first day of this hearing the commission ruled: "All of the evidence which the protestants desire to present bearing on that question of public interest, tending to show that the passage of this order approving the issuance of these securities is against the public interest will be gladly heard and considered by the Commission." (Stenographer's Transcript, Vol. 1, dated December 2, 1947, page 20.) This attitude resulted in such a complete hearing that the evidence there taken was by agreement of counsel accepted as part of the record of both the S. E. C. and the F. P. C. Additional testimony was taken before the S. E. C., but not before the F. P. C.

The Charleston Group next brought an action in the Court of Common Pleas for Richland County, South Carolina, to review the orders of the state commission, as provided for in the aforesaid regulatory act, which was heard February 27, 1948. The court heard extensive oral arguments, called for two sets of briefs, and on April 3, 1948, affirmed the orders both on the law and the facts and dismissed the complaint, with a well-considered opinion. (R. 263-271.) An appeal noted to the Supreme Court of South Carolina by the Charleston Group was dismissed without their objection on May 14, 1948, and the decree of the state court then became final.

Neither Commonwealth nor Power Company was a party to the proceeding before the state commission or court. The Authority was not a party to the court proceeding.

Next in time, the S. E. C. issued an order on March 25, 1948, authorizing Commonwealth to sell the stock of Power Company to Electric & Gas. (R. 74-101.) This order was subject to rule U-24, which required that the transaction authorized should be carried out within sixty days from the date of the order. The sixty days expired on May 24, 1948. The stock was sold and delivered on May 18, 1948. (R. 306.) The Charleston Group and the Authority intervened as protestants before the S. E. C., but the Authority alone petitioned the Court of Appeals for a review of the order of the S. E. C.

Next in time, the F. P. C. issued an order on April 29, 1948, permitting Electric & Gas to buy the stock from Commonwealth. This carried an express condition reading: "This authorization shall expire unless acted upon within sixty days after the entry of this order"—which made the expiration date June 28, 1948. (R. 2, 10.) Commonwealth was not a party to this proceeding, but the Charleston

Group and the Authority intervened as protestants therein, although the Authority alone filed a petition for a review of this order (No. 5793) in the Court of Appeals.

The Facts as to the Closing

Electric & Gas found itself in the following situation when the F. P. C. order came down on April 29, 1948. The stock purchase contract was dated October 28, 1947, and the original closing date was January 6, 1948. Pursuant to section 1, Electric & Gas had made a deposit of a half-million dollars as earnest money. The contract was, of course, conditioned on requisite approvals, and the closing date was necessarily extended by mutual agreement five times—the last time until May 31, 1948—awaiting the decisions of the two Federal Commissions. The order of the S. E. C. issued March 25, 1948, and the time limit of sixty days thereunder expired May 24, 1948. The S. E. C. had said: "Commonwealth has requested that the order of the Commission with respect to the proposals before us become effective immediately in order that the sale may be consummated expeditiously. We deem it appropriate to grant this request." (R. 96-97.) The S. E. C. had denied the Authority's petition for rehearing on April 16, 1948.

Commonwealth was in urgent need of the $10,200,000.00 to relieve a cash stringency on account of the construction program of two operating subsidiaries in Georgia and Alabama. This was recognized by the S. E. C. (R. 92), and Commonwealth intended to and did apply the funds to that purpose (par. 7, Whiting affidavit, R. 310).

Commonwealth insisted on performance because it needed the money. The underwriters reported that it was a good time to sell the securities. Counsel for the various interested parties advised their respective clients that the transaction could be lawfully consummated. Electric & Gas

considered the proposition a beneficial one for its stockholders and the customers of Electric & Gas and Power Company and was faced with the loss of this opportunity and question as to its earnest money if it did not proceed. It was in this setting and in these circumstances that Electric & Gas decided to close.

The Costello and Whiting affidavits (R. 300-311) show that some 6,500 private investors throughout the country and four banks, as well as Electric & Gas and Commonwealth, and others dealing with the latter have substantially changed their financial position and status and that this cannot be restored without prejudice. All acted in good faith and in reliance on the simple and unambiguous orders of the two Federal Commissions, which were in turn based on the clear and simple authorization of the Congress.

If the parties had not acted when they did, but had decided to await the expiration of the appeal period and if two Federal Commissions had extended their orders indefinitely, they would be waiting today, after the passage of more than sixteen months since the execution of the contract. No responsible and experienced party would enter into a contract of this character with the performance thereof so uncertain as to time and cast so far into the future.

The negotiations between Commonwealth and the Authority were res inter alios acta as to Electric & Gas.

The Federal Works Agency filed its petition for intervention with the F.P.C. on April 26, 1948, and suggested that the F.P.C. inquire whether there existed an understanding between Electric & Gas and Commonwealth and others to restrict the sale of electric energy and prevent competition therein in violation of law. The F.P.C. referred to this petition in its statement (R. 6) and later posed the suggestion, and in answer thereto said: "• • •

we find no evidence in the record before us which would warrant such further investigation. * * *" (R. 8.)

Notwithstanding this finding, and notwithstanding that the Agency did not join in the petition for review below, the Authority saw fit to charge, on page 3 of its brief below, that the F.P.C. erred in failing to make findings on the facts of "the restrictive and illegal conditions sought to be imposed by Commonwealth upon the Authority and the probability that such conditions were implicit in the arrangements between Commonwealth and Electric & Gas." And on page 21 of its brief the Authority asserted "the strong inference that Electric & Gas has reached with Commonwealth illegal and contra-public policy agreements relating to the limiting of competition and the use of public power generated at Clark's Hill."

Electric & Gas was not a party to and did not participate in any way or to any extent in the negotiations between Commonwealth and the Authority. Electric & Gas attended strictly to its own business in this transaction, as it tries to do in all matters. There is not a scintilla of evidence in the record that there was any secret agreement or collusion between Electric & Gas and Commonwealth in this respect, or any other. There was none in fact. The brief made no supporting reference to any such evidence. It was a baseless charge that might well have been omitted. The court below did not dignify it by making reference thereto.

The Creech Case, 200 S. C. 127, 20 S. E. (2) 645

Petitioner's statement (page 8) quotes subdivisions (7) and (8) of the Authority's enabling act of 1934, which is printed commencing at R. 111. This Court might reasonably draw the inference from what is said by petitioner that the *Creech case* turned on a construction of these two

subdivisions standing alone. This is not so. The act printed is taken from the Code of 1942, wherein the sections carry numbers that are different from their numbers in the original act. Section 3 of the act is numbered as section 8555-13 of the Code (R. 113). This section first carries a general grant, as follows:

> "8555-13. Powers.—The public service authority shall have power to develop the Cooper River, the Santee River, and the Congaree River in this State, as instrumentalities of intrastate, interstate and foreign commerce and navigation; to produce, distribute and sell electric power; to reclaim and drain swampy and flooded lands; and to reforest the water sheds of rivers in this State; and shall also have all powers which may be necessary or convenient for the exercise of such powers, including, without limiting the generality of the foregoing, the following powers: * * *." (R. 113.)

Then follow twenty-one subdivisions, among which are found subdivisions (7) and (8) quoted on page 8 of the petition.

The Supreme Court of South Carolina first quoted the general grant of power from section 3 of the enabling Act (now section 8555-13 of the Code) and held that there was nothing in this general grant of power which authorized the Authority to purchase the completed and operating public utilities in question—that the purport of the general grant was governed and controlled by the word "develop." 200 S. C. at 139, 20 S. E. (2) at 649. The Court then quoted several subdivisions of section 3, including (7) and (8). It specifically denied that subdivision (7) authorized the purchase of fully developed public utility businesses serving great areas of the State, and said further concerning it:

> "* * * The words in their natural context and in their relation to the whole Act are reasonably refer-

able and conclusively so we think, to the power to develop and construct by bringing into being new facilities, rather than the power to buy or acquire great power plants long since engaged in the production of electric energy. It was never the intention of the Legislature, as we gather from the whole Act, that the Authority should be given the power to buy an existing utility system in order to produce, distribute and sell electric power. The significance and meaning of the word 'develop' is easily discernible in the structure of the entire statute.

"Subdivisions 8 and 20 of Section 3 have no relation to the acquisition of electric utilities. They deal solely with the dominant purpose of the Act, that is, the development of the natural resources of the State." 200 S. C. at 141, 142, 20 S. E. (2) at 650.

The court then quoted from section 5 of the act (now section 8555-16 of the Code—R. 123-124), and later quoted from section 7 (now section 8555-18 of the Code—R. 125) in support of its holding that the Authority was created for the primary purpose of developing and conserving the natural resources of the State within territorial limits and had no power to purchase existing completed and operating utility companies, irrespective of their geographical location in the State. 200 S. C. at 144, 20 S. E. (2) at 651.

The court made it as clear as the English language permits that there was a complete absence of power to purchase a completed and operating utility and hence the court did not rely on the limitation in subdivision 21 of section 3 of the act (section 8555-13 of the Code—R. 116) as a limitation on such power. It held that this limitation (on the power of the Authority to study and consider all undeveloped power sites and navigation projects in the State and to acquire and/or develop the same) did not enlarge such general grant of power found in the opening paragraph of section 3 of the act (section 8555-13 of the Code—

R. 113). The court considered the somewhat similar proviso to section 5 of the act (section 8555-16 of the Code—R. 124) in connection with its consideration of subdivision 21, so that this holding covered that section also. 200 S. C. at 142 *et seq.*, 20 S. E. (2) at 650 *et seq.*

This holding is crystal clear that the Authority has no power to purchase a completed and operating electric utility, irrespective of its location. The court below was right.

We can add nothing to what the court below said with reference to the order on the petition for rehearing in the *Creech case* (R. 329).

The contract considered in the *Creech case* was one whereby the Authority undertook to acquire the securities of Electric & Gas and its former associate company, Lexington Water Power Company, which has since been consolidated with Electric & Gas. Power Company is likewise a completed and operating electric utility and had been such for years when the Authority was created in 1934. The Authority has no more power to buy the stock of Power Company now than it had to buy the stock of Electric & Gas and Lexington in 1942.

The second ratio decidendi of the Creech Case.

The Supreme Court of South Carolina further specifically denied, as an equally primary ground of its decision, that the Authority had the power to purchase or own or operate a gas production and distribution system or a bus transportation system, such as were owned and operated by Electric & Gas in the City of Columbia and its environs. The petition here states the indisputable fact that Power Company "is also engaged in the manufacture and sale of gas and in rendering bus transportation service in

Charleston and nearby communities" (page 5). Charleston is a larger city than Columbia and the gas and transportation properties now owned and operated by Power Company are comparable in size and value with those owned and operated by Electric & Gas in and around the City of Columbia in 1942. In this respect, the Supreme Court of South Carolina held:

> "Nowhere in the enabling Act is authority conferred upon the defendants to engage in the production and sale of gas and to own a bus line and operate a system of transportation in the City of Columbia. These properties are valued at over two million dollars, but the defendants argue that their inclusion in the proposed purchase is merely temporary or incidental, and represents no substantial part of the regular permanent business of the utility companies in question. We are unable to share this view. In the first place the production, distribution and sale of gas in the cities of Columbia, Florence and Darlington and the furnishing of bus transportation to the large and expanding City of Columbia and nearby Fort Jackson, cannot reasonably be regarded incidental to the business carried on by the Gas and Electric Company. In the second place, the charter of a corporation is a measure of its powers; and an enumeration of these powers implies an exclusion of all others. The power to purchase gas plants and to buy and operate a large bus transportation business is not bestowed by the statute, and is contrary to its general purpose, which is the development and conservation of the natural resources of the State within territorial limits." 200 S. C. at 145, 20 S. E. (2) at 652.

The court below evidently found the first *ratio decidendi* so clear and conclusive that it did not deem it necessary to refer to this one.

Public Interest Considerations

1. Electric & Gas recognizes that neither it nor Power Company can produce hydro-electric energy from their several hydro plants as cheaply as the Authority can, taking investment, interest charges and taxes into consideration. The petition states (p. 5) that the investment in Authority's hydro plant at Pinopolis, commonly referred to as Santee-Cooper, is $60,000,000.00. The intervention petition of the Federal Works Agency states that it holds the obligations of the Authority to the amount of approximately $29,000,000.00, and shows that the remaining $31,000,000.00 consisted of grants through the W.P.A. and P.W.A. The interest rate on the Authority's obligations held by the F.W.A. has been reduced to 2%. The Authority is, of course, exempt from many heavy state and federal taxes, which privately owned utilities must pay.

Electric & Gas has not sought to inject the question of public power versus private power into this proceeding. This injection has been the effort of the Authority and the Federal Works Agency. Although faced with the threat of destructive competition, boldly and deliberately announced by the Authority before the state commission (R. 47), Electric & Gas had and now has nothing to say on this political question because it does not deem it to have any bearing on the merits of this controversy.

2. On pages 12-13 of the petition under 2 the Authority lists the determining circumstances as (a) generating capacity and (b) financial position, and under 3 (pages 14-16) it adds (a) adequacy of power supply and (b) rates.

The state commission said:

> "The principal issues presented by the evidence and the arguments are: (1) as to the financial strength of the purchasing company or of the companies under

combined ownership; (2) as to the adequacy of the power supply and generating capacity of the companies under combined ownership; and (3) as to whether as a condition to the acquisition of the stock of the South Carolina Power Company, the South Carolina Electric and Gas Company should be required to provide for a rate reduction by the South Carolina Power Company." (R. 260.)

These fairly cover the items listed by the Authority. There were only three witnesses who testified from knowledge based on experience in utility construction, operation, management and financing. The first was Mr. Walter C. Herbert, who had been with the electrical utilities division of the state commission since 1932 and director thereof since 1939, and who was examined and cross examined at length by various counsel. The important portions of his testimony are printed in R. 151-174 and 177-181.

The second material witness was Mr. S. C. McMeekin, president of Electric & Gas, who was examined and cross examined at length. The whole of his direct testimony and the whole of his cross examination by Senator Jefferies, appearing for the Authority, is printed in R. 181-247.

The third material witness was Mr. J. M. Costello, vice-president in charge of finance for Electric & Gas, who was likewise examined and cross examined. Excerpts from his testimony are printed in R. 174-177, 247-257.

The only witness sworn by the Authority was Mr. J. H. Hammond, chairman of its board of directors, who read a prepared statement which is printed in R. 33-56. But this does not include his cross examination by various counsel (Transcript, IV, December 9, 1947, pp. 42-130). It appeared therefrom that the statement was prepared by the staff of the Authority and that Mr. Hammond had little or no personal knowledge of many factual assertions made

therein. The statement contains however little or no relevant or material evidence in respect of the issues under discussion. It is largely confined to a detailed account of the negotiations between the Authority and Commonwealth and the so-called offer as to what the Authority would do, together with the conditions that it requested the state commission to impose on Electric & Gas, if its petition should be granted.

The protestants relied almost entirely on various exhibits prepared by them, based on figures introduced and in the commission's records, together with protestants' conclusions and inferences therefrom. These were shown to be erroneous in many instances and otherwise were of little, if any, substantial value with reference to the factual issues presented. They can at most reasonably be said to have raised only minor issues of fact, all of which were determined in favor of Electric & Gas by the state commission, the state court and the F.P.C. Electric & Gas asserted and contended below, as it does here, that the testimony of Messrs. Herbert, McMeekin and Costello constituted substantial evidence to support the findings of fact by the F.P.C.

The order of the state commission dealt separately with each of the issues presented as quoted *supra,* as well as other questions. Its conclusion was thus stated:

> "On the whole, the Commission is of the opinion, and so finds from the evidence, that it would be, and is, in the public interest that the South Carolina Electric and Gas Company be authorized to issue the securities proposed in the petition for the acquisition of the stock of the South Carolina Power Company." (R. 259-262.)

The last paragraph of the well considered opinion of the able, experienced and respected state judge reads:

"I have in mind that section 8555-6(4) of the Code specifically provides that the burden of proof shall be on the plaintiffs in this action, and that apart from statute the rule is settled 'that the Commission's findings of fact are prima facie correct and should not be set aside unless clearly against the weight of the evidence.' *Southern Ry. Co. v. Commission,* 195 S. C. 247, at 256, 10 S. E. (2) 769. But notwithstanding this, I have considered the evidence as if it had been taken de novo in a suit tried before me in which I was to find the facts. And it is from this viewpoint that I find and hold that the findings of fact made by the Commission in its Orders E-576, E-578 and E-579 are sustained by the clear weight of the evidence and that all contentions made by plaintiffs based on the facts must be overruled and the Orders of the Commission affirmed." (R. 263-271.)

The order of the F.P.C. speaks for itself (R. 2-10), as does the unanimous opinion of the court below written by Chief Judge Parker (R. 325-330).

There are other factual assertions in 3 and 4, pages 14-16 of the petition, which were also made in petitioner's brief below and there answered in detail in the brief for Electric & Gas at pages 23-28. These were shown to be inaccurate, largely due to a misconception of the technical testimony by counsel for the Authority.

ARGUMENT

I

As to The Construction of Section 203(a) of The Federal Power Act

A. The Authority's Contention.

The practical effect of the Authority's contention throughout is that, by reason of section 203(a) of the

Federal Power Act (printed at page 33 of petitioner's brief; 16 U.S.C.A. 824-b(a)), Electric & Gas acquired no rights under its contract with Commonwealth; that, notwithstanding the contract, the F.P.C. should have denied the application of Electric & Gas because the Authority wished to purchase the stock and the acquisition thereof by the Authority was more in the public interest.

This is predicated on the assertion that acquisition by the Authority was and is immediately available as an alternative to acquisition by Electric & Gas. This assertion is in the teeth of the *Creech case.* But, taken for the moment at its face value, this contention of the Authority is *contra* the plain meaning of the simple language of section 203(a).

B. The Contention of Electric & Gas.

Electric & Gas had the right to buy the stock under the laws of South Carolina. The state court held: "* * * In so far as authority to purchase the stock from C. & S. was concerned, the Columbia Company needed no approval of the Commission. The Columbia Company had the statutory power to make the purchase under sections 7677 and 7745 of the Code. There is no inhibition against such a purchase in the Regulatory Act of 1932 (now section 8555 of the Code), and, if the Columbia Company had had the money to make the purchase from C. & S., it could have done so without approval of the Commission. * * *" (R. 265.) This legal proposition has never been disputed—even by the Authority.

Section 203(a) confirms the existing substantive right resulting to Electric & Gas from its contract with Commonwealth. This is sustained by the well reasoned opinion in *Pacific Power & Light Co. v. Federal Power Commission,* 98 F. (2d), 835, 837—affirmed 307 U. S., 156, 83 L. Ed., 1180. In that case the F.P.C. denied the application of Pacific

and its subsidiary Inland for approval of the transfer to Pacific of Inland's properties and assets under section 203 (a). The following is quoted from the opinion:

> "* * * We agree that the section conferred a substantive right to the Commission's approval, upon compliance with the showing required by the statute."

The F.P.C. had denied the application, and in that respect the court added:

> "Nor is there any merit in the contention that the denial merely places the petitioners in the same status as before applying for the order. On the contrary, if the petitioners' contention regarding consistency with the public interest be correct, before the order they were in possession of a right granted by Congress. After the order, they were deprived of it.
>
> "When such a claimed substantive right so definitely created by the Act is denied, the petitioner is a 'party aggrieved' within the specific provisions of s. 313(b). * * *"

In other words, Electric & Gas had, by reason of its contract, an absolute right under the laws of South Carolina, plus a substantive right to the F.P.C.'s approval under section 203(a), subject only to Electric & Gas showing that the purchase was consistent with the public interest.

If section 203(a) be construed as contended for by the Authority, this is *contra* the plain meaning of the simple language used and destroys the right that Electric & Gas had acquired under its contract with Commonwealth. The Authority contends in effect that when Electric & Gas applied to the F.P.C., and when the Authority intervened in opposition, they stood on an equal footing at the hearing; and this notwithstanding that Electric & Gas had a solemn contract with Commonwealth, that Commonwealth had rejected the Authority's offer and accepted the offer of Elec-

tric & Gas, that the state commission and court had approved the issuance of the securities because this had been proved to be in the public interest, and that the S.E.C. had authorized Commonwealth to carry out its contract and sell to Electric & Gas.

If the Authority's contention be sustained, this would wipe out the orders of the S. E. C. and the state commission and court, as well as the substantive contract right of Electric & Gas. On the other hand, the plain meaning of section 203(a) is merely that no such contract shall be recognized by the F.P.C. unless it be shown to be consistent with the public interest. The public is not entitled to reap a benefit from such a transaction; but the public is to suffer no prejudice as a result thereof. The construction in the *Pacific Power & Light case* preserves the constitutional right of freedom of contract and in the same breath guarantees against prejudice to the public. It is contrary to fundamental justice to void a contract right of even a privately owned public utility that does not prejudice the public.

II

Offers Not Binding on Authority

A. Offer to Buy Stock.

"Commonwealth rejects Authority's offer." This is the heading from page 7 of the petition. The rejection took place in October, 1947. More than sixteen months have elapsed. Can it be said that the Authority's expression of its desire and willingness to buy the stock at the higher price, which was expressed, as we understand the Authority's contention, before the three commissions in December, 1947, and in January, 1948, constituted a legal offer binding on the Authority for an indefinite time? The Authority has never offered to post any bond or earnest money or other

guarantee of performance. Its theory has always been that Commonwealth and Electric & Gas should bear the admitted risk. In other words, the Authority sought to enjoy a gamble at the risk and expense of others. This would be a pleasant adventure—but only from the Authority's viewpoint.

If the proceeding should be sent back to the Federal Commissions, when will this be, and when will the second round be finally ended, bearing in mind that there must be another decision secured from the Supreme Court of South Carolina? We do not undertake to answer this question.

If the two Federal Commissions should decide in the Authority's favor and the Supreme Court of South Carolina should reverse the *Creech case* and affirm the power of the Authority to buy, and if, during the appreciable length of time that all this will take, the existing economic recession or "dis-inflation" should ripen into a genuine depression, so that the Authority could not finance the purchase, or so that it would be absurd and ridiculous to proceed if it could do so, would the Authority nevertheless be bound?

If the Authority then failed to perform, could Commonwealthy secure a judgment for breach of contract against the Authority and enforce this against the property owned by the State, notwithstanding that the doctrine of equitable estoppel does not apply as against the sovereign State of South Carolina? *Carolina National Bank v. State of S. C.*, 60 S. C. 465, 38 S. E. 629.

Since it is conceded that the Authority's offer is conditioned on a favorable decision from the Supreme Court of South Carolina, all must admit—including counsel for the Authority—that consummation is pregnant with substantial doubt. And for the adventure to proceed to the point

that a court decision can be obtained the Authority must have a firm contract with Commonwealth. If Commonwealth was thus left to the tender mercy of the Authority, would the Authority comply with its offer to pay $11,600,000.00; or would the Authority offer $10,200,000.00, the price paid by Electric & Gas, or even less, and claim that this was a fair and equitable price?

We earnestly ask this Honorable Court to ponder the above suggested complexities and uncertainties from the practical and equitable as well as the legal viewpoint, and to bear in mind that before such an adventure can be launched the lawful contract between Commonwealth and Electric & Gas must have been rescinded (for no wrong chargeable to Electric & Gas) and the stock returned to Commonwealth. As we see such an operation, the result will prejudice many thousand innocent persons, and if the patient (Electric & Gas) recovers, it will be only after a long financial convalescence from a serious and unjust financial injury.

B. The Offer of a Ten Percent Rate Reduction.

The Authority asserted in its brief below (Note, p. 12) that "by the terms of the Act setting up the Authority the South Carolina Commission has no jurisdiction over it," citing section 8555-13(13) of the Code. (R. 114, 115.) This subdivision of the act of 1934 empowers the Authority to fix and determine its own rates, and we agree that to this extent the Authority is relieved from the jurisdiction of the state commission under the regulatory act of 1932. We do not agree that the Authority is relieved from the jurisdiction of the state commission in other respects; on the contrary, we assert and contend that the Authority is subject to the jurisdiction of the state commission, excepting only

as to the fixation of its rates. But this question is not pertinent here.

Section 201(f) of the Federal Power Act, 16 U.S.C.A. 824(f), relieves "any agency, authority or instrumentality" of any State from Subchapter II of that Act, which includes the power of the F.P.C. to fix rates. This exemption covers the Authority.

The result is that the Authority has the right and power to fix and determine its own rates. If, therefore, because of change in economic conditions, or for any reason satisfactory to it, the Authority should decide not to make a rate reduction, or, having made one, to raise the rates to the original level or even above that, the question would be presented as to what law or sanction could be invoked to require the Authority to perform its promise to reduce rates. We know of none.

III

The Moot Question

This Court will not consider a petition for *certiorari* based on a question that was decided in favor of petitioner below. (R. 330.)

CONCLUSION

The decision below was entirely on the merits according to the facts, rating the question concerning the effect of the decision in the *Creech case* as a fact in the case. The case involves unusual facts—so much so that it seems reasonable to prophesy that there will never be another like it.

There was no question of general interest decided against petitioner below.

It is respectfully submitted that the petition for *certiorari* should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 590

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION AND
THE COMMONWEALTH & SOUTHERN CORPORATION.

No. 591

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY,
Petitioner,

v.

FEDERAL POWER COMMISSION AND SOUTH CAROLINA ELECTRIC & GAS COMPANY.

BRIEF FOR THE COMMONWEALTH & SOUTHERN CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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INDEX

PAGE

Opinions and Orders Below 1

Jurisdiction 2

Statutes Involved 3

Question Presented 3

Statement 3

Argument 9

SUMMARY—This case, while of importance to Commonwealth and to Electric & Gas and their stockholders, is of little or no public importance and lays down no important principle of Federal or State law 9

POINT I—The United States Circuit Court of Appeals did not decide in this case "an important question of local law in a way probably in conflict with applicable local decisions" 10

POINT II—The Commissions considered all relevant evidence in authorizing the transaction involved and no important question of Federal law is presented 13

Conclusion 16

CITATIONS

PAGE

CASES:

South Carolina Public Service Authority *v.* S.E.C., 171 F.(2d) 948 (1948) (Opinion below) . . 1, 9, 10, 11

Creech *v.* South Carolina Public Service Authority, 200 S. C. 127, 20 S. E. (2d) 645 (1942) . . . 3, 5, 9, 10 11, 12, 13, 16

STATUTES:

Administrative Procedure Act (5 U.S.C. 1001 et seq.) Section 10 (5 U.S.C. Sec. 1009) 2

Code of Laws of South Carolina, 1942, Sec. 668 6

Federal Power Act (16 U.S.C. 791 et seq.) Section 313(b) (16 U.S.C. 825(1)(b)) 2

Public Utility Holding Company Act of 1935 (15 U.S.C. 79), Section 24(a) (15 U.S.C. 79x(a)) 2

Section 11(b)(1) (15 U.S.C. 79k(b)(1)) 4

RULES:

S.E.C. Rule U-24 7

Supreme Court Rule 38(b) 10, 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 590

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION AND
THE COMMONWEALTH & SOUTHERN CORPORATION.

No. 591

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY,
Petitioner,

v.

FEDERAL POWER COMMISSION AND SOUTH CAROLINA ELECTRIC & GAS COMPANY.

BRIEF FOR THE COMMONWEALTH & SOUTHERN CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Opinions and Orders Below.

South Carolina Public Service Authority (herein called "Authority") has prayed for writs of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered November 10, 1948 reported at 171 F.(2d) 948 (1948). A copy of the opinion and order is set forth in the printed record at pages R-SEC

310-317 and R-FPC 324-331[1]. The said order of the Court of Appeals for the Fourth Circuit affirmed opinions and orders of the Securities and Exchange Commission (herein called "SEC") under the Public Utility Holding Company Act of 1935[2] (herein called the "Act") and of the Federal Power Commission (herein called "FPC" under the Federal Power Act[3] which approved respectively the sale by The Commonwealth & Southern Corporation (Delaware) (herein called "Commonwealth") and the acquisition by South Carolina Electric & Gas Company (herein called "Electric & Gas") of all the common stock of South Carolina Power Company (herein called the "Power Company"). The opinions and orders of the two federal commissions are set forth in the printed record, the opinion and order of the SEC at pages R-SEC 2-29 and the opinion and order of the FPC at pages R-FPC 2-10.

Jurisdiction.

The judgment of the Court of Appeals for the Fourth Circuit was entered on November 10, 1948 (R-SEC 317; R-FPC 331). The jurisdiction of this Court is invoked under Section 24(a) of the Public Utility Holding Company Act of 1935 (August 26, 1935, c. 687, Title I, Sec. 24(a), 49 Stat. 834; 15 U.S.C., Sec. 79x(a)), Section 313(b) of the Federal Power Act (August 26, 1935, c. 687, Title II, Sec. 213, 49 Stat. 860; 16 U.S.C. Sec. 825(1)(b)), Section 10 of the Administrative Procedure Act, (June 11, 1946, c. 324, Sec. 10, 60 Stat. 243; 5 U.S.C. 1009) and Title 28, United States Code, Sections 1254 and 2101.

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1. References to the printed record are designated "R-SEC" in the case of the record on review of the SEC's order, and "R-FPC" in the case of the record on review of the FPC order, followed by appropriate page numbers.

2. August 26, 1935, c. 687, Title I, Sec. 33; 49 Stat. 838; 15 U. S. C. Sec. 79.

3. August 26, 1935, c. 687, Title II, Sec. 212; 49 Stat. 847; 16 U. S. C. Sec. 791 et seq.

Statutes Involved.

Pertinent provisions of the Public Utility Holding Company Act of 1935 and of the Federal Power Act are set forth in the printed record at pages R-SEC 109-111 and page R-FPC 110, respectively.

Question Presented.

The question presented is whether the court below erred in affirming the orders of the SEC and the FPC approving respectively the sale by Commonwealth and the purchase by Electric & Gas of all the common stock (800,000 shares) of the Power Company, in view of the fact that a public authority made a conditional offer of a higher price if, as and when its extremely doubtful legal power to make the purchase should be established.

The question is not as stated by petitioner, whether the court below erred in holding that the decision of the Supreme Court in South Carolina in *Creech* v. *South Carolina Public Service Authority*, 200 S. C. 127, 20 S. E. (2d) 645 (1942), was a bar to the right of petitioner to acquire the stock of the Power Company because no such decision was made. The Court did no more than to confirm, in strong terms, the finding of the SEC that under the law of South Carolina there was "grave doubt" of the Authority's legal power to make such a purchase. Nor is there a question as stated by petitioner whether the court below erred in approving the refusal of both said commissions to consider relevant evidence because the commissions did consider all relevant evidence on the issues before them. Because of the "grave doubt" as to the Authority's legal power to make the desired purchase, the issue that it asserts was presented to the commissions and the court by its desire to buy was never, in fact, reached.

Statement.

Commonwealth is a public utility holding company registered as such under the Act. The Power Company, a

subsidiary of Commonwealth for many years, carries on the electric, gas and local transportation business in Charleston, South Carolina and an electric business throughout the southwestern portion of that state. Adjoining its properties on the north for a considerable distance and interconnected therewith at four points are the electric properties of Electric & Gas, a utility company operating electric, gas and local transportation business in Columbia, South Carolina and supplying electricity throughout the northwestern area of the state. The Authority, a state agency, owns and operates the so-called Santee-Cooper Hydro-Electric Project and has facilities interconnecting with those of both the Power Company and Electric & Gas, to both of which it is now selling or has in the past sold electric energy.

Early in 1947 Commonwealth consented, subject to various conditions, to the entry by the SEC under Section 11(b)(1) of the Act of an order requiring Commonwealth's divestment of its interest in the Power Company. Thereupon, active negotiations were undertaken by Commonwealth with both Electric & Gas and the Authority for possible sale to them of such interest. At about the same time, namely in May 1947, the Power Company, in order to obtain funds for its construction program, offered 200,000 shares of its common stock for sale at competitive bidding at a price of $12 per share or better, Commonwealth having indicated its willingness to purchase at that price. Receiving no bid for such stock of $12 per share, it accordingly sold such stock to Commonwealth at that price (R-SEC 145-150).

On August 1, 1947 the SEC entered the divestment order requiring the disposition by Commonwealth of all its interest in the Power Company. Thereafter negotiations with Electric & Gas and Authority continued. Eventually Commonwealth received a final offer from Electric & Gas to purchase the stock at $12.75 per share, plus certain additional considerations. (R-SEC 154-155).

During the negotiations with the Authority there was no serious dispute that the legal power of Authority to purchase was doubtful. In fact, it was recognized by Authority in the course of these negotiations that it could not either make or finance such a purchase unless it obtained a favorable decision from the South Carolina Supreme Court establishing its legal power to purchase (R-SEC 151, 184-185, 206-207). This doubt was caused by the earlier decision of the Supreme Court of South Carolina in *Creech v. South Carolina Public Service Authority, supra.* In that case the court enjoined an attempted purchase by Authority of Electric & Gas and its then associated company, Lexington Water Power Company, since absorbed by Electric & Gas, as beyond the powers vested in the Authority by the act of South Carolina creating the Authority.

In the course of the negotiations with the Authority Commonwealth, in view of the "grave doubt" as to the Authority's legal power to buy, proposed certain conditions to be included in any contract of sale should an agreement be reached as to price and other terms. Among the more important of these conditions was one providing that, if the Supreme Court of South Carolina should hold to its opinion in the *Creech* case and rule against the Authority's power to buy, then the Authority would extend its contract with the Power Company for the sale to the latter of electric power for a period of 25 years. This condition was obviously important to Commonwealth because if, after a litigation, the Supreme Court should hold to the *Creech* opinion on the Authority's power to buy, Commonwealth might not be able to consummate a sale to Electric & Gas or any one else on satisfactory terms, and certainly not on terms as satisfactory as those Electric & Gas was then offering, and if the Authority should thereupon refuse to sell power to the Power Company, Commonwealth would suffer a further very substantial reduction in the value of such stock. (R-SEC 150-153, 161-163). The Authority refused

to accept this or the other conditions proposed by Commonwealth but did eventually increase the price that it would have been willing to pay, could it buy, for the stock of the Power Company. This offer was conditional upon its obtaining the required favorable decision of the South Carolina Supreme Court.* The price so contingently offered was also higher than that of Electric & Gas.

The Board of Directors of Commonwealth thereupon considered at length the offer received from Electric & Gas and the offer received from the Authority and, in the exercise of their best business judgment, decided to accept the offer of Electric & Gas "as the surest and the best way we could get the largest amount of money" (R-SEC 20, 196-197, 225-228). Thereafter the Authority indicated its willingness to "enter further discussions of conditions"

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* Petitioner's assertion that Commonwealth "reneged" on an agreement with the Authority which would have made it possible for the Authority to obtain the initiation of litigation to further test its power to buy is patently false since a contract of sale was treated throughout the negotiations as an essential to the initiation of any such litigation and Commonwealth and the Authority never were able to or did agree upon mutually satisfactory terms for such a transaction. Petitioner's assertion that an order of the SEC requiring Commonwealth to offer the stock at competitive bidding to the highest bidder having legal power to buy would have laid the basis for litigation to obtain the required decision, is based not on authorities but solely on a statement of counsel for the Authority in argument in the SEC hearings, and a reference to Section 668 of the Code of Laws of South Carolina. The assertion will not stand analysis since Section 668 requires an agreed statement of facts by "parties to a matter in dispute, which may be the subject of a civil action" and an affidavit "that the controversy is real". Such an order would not provide a "matter in dispute which may be the subject of a civil action" any more than the offers Commonwealth had already made nor would it facilitate the obtaining of an agreed statement of facts (R-SEC 184-185, 191). It is clear, therefore, that the possibility of obtaining the required decision on such a basis is wholly conjectural and, at the very least, gravely uncertain.

but it was then too late for a contract with Electric & Gas had been signed (R-SEC 213).

After Commonwealth and Electric & Gas had signed a contract covering the sale, each proceeded to obtain the necessary authorizations of regulatory bodies having jurisdiction. As Commonwealth is a holding company, the sale by it required the approval of the SEC. Electric & Gas's purchase required the approval of the FPC and the issue by Electric & Gas of securities to finance the acquisition required the approval of the South Carolina Public Service Commission.

Authority, with certain other objectants, participated in hearings and arguments before all three commissions. The three commissions overruled the Authority's objections and arguments and granted the approvals requested. The order of the State commission has since been confirmed in all respects on review by the South Carolina courts (R-SEC 214-224, 292). Electric & Gas was not a party to Commonwealth's proceedings before the SEC; Commonwealth was not a party to Electric & Gas's proceedings before the FPC or the State commission.

The SEC order was issued March 25, 1948. It provided that the authority granted was subject to Rule U-24 of the SEC's General Rules and Regulations under the Act. This rule requires that transactions shall be carried out within 60 days from the date of the order authorizing the sale. Sixty days from March 25, 1948 was Monday, May 24, 1948.

The last order issued was that of the FPC on April 29, 1948. On receipt of that order Electric & Gas proceeded immediately to make sales of its securities in amounts necessary to finance the purchase and for other purposes. Of the approximately $12,850,000 so obtained, approximately $6,650,000 was derived from sales of securities to existing stockholders of Electric & Gas and, through 26 underwriters, to the public, or a total of approximately 6,500 investors throughout the United States. The balance was derived from loans.

On May 18, 1948, and six days before the expiration of the sixty-day period, no petition for review of the orders of the SEC or FPC having been filed and no application having been made for a stay of either thereof, the transaction was consummated and Commonwealth delivered its stock in Power Company to Electric & Gas and received the purchase price. From the proceeds of the financing by Electric & Gas it provided for the payment not only of the purchase price of the stock but also of approximately $350,000 for underwriting commissions and expenses and for an advance of approximately $1,680,000 to Power Company, which Power Company applied to payment of its outstanding bank loans.

The order of the SEC reserved jurisdiction to it over the use by Commonwealth of the proceeds of the sale of the stock. Following consummation of such sale, Commonwealth requested and received authority of the SEC to use said proceeds or an amount equal thereto in the acquisition of additional shares of common stock of The Southern Company, a subsidiary of Commonwealth. On July 15, 1948 Commonwealth applied $10,200,000 to the purchase from The Southern Company of 1,020,000 shares of its common stock and The Southern Company used said $10,200,000, together with other funds, to purchase for $13,000,000 additional shares of common stock of its subsidiary companies, Alabama Power Company and Georgia Power Company. Said companies in turn have used or are using said monies, with the approval of their respective public service commissions, in the construction of power plants, transmission lines and other capital additions.*

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* The facts relating to the consummation of the sale by Commonwealth and its use of the proceeds therefrom are contained in the affidavit of Justin R. Whiting, President of Commonwealth (R-SEC 283-290). The facts relating to the consummation by Electric & Gas of such purchase, and the financing thereof, are contained in the affidavit of J. M. Costello, Vice-President of Electric & Gas (R-SEC 291-299).

ARGUMENT.

SUMMARY

This case, while of importance to Commonwealth and to Electric & Gas and their stockholders, is of little or no public importance and lays down no important principle of Federal or State law.

What this case is has been succinctly and accurately summarized in the opinion of the Court of Appeals:

> "There can be no question but that the order of the S.E.C. approving the sale by Commonwealth and Southern and the order of the F.P.C. approving the purchase by Electric and Gas would be unassailable but for the offer made by the Authority; and we agree with the S.E.C. that the decision in the Creech case raises such doubt as to the ability of the Authority to purchase that its offer should not be considered as ground for invalidating the proposed sale. * * * (R-SEC 313)
>
> "The case comes to this: Commonwealth and Southern has been ordered by the S.E.C. to divest itself of the Power Company stock. It has worked out a plan to carry out this order by sale to Electric and Gas. There is abundant evidence that the sale is fair to all parties, that it will result in divesting Commonwealth and Southern of all control over the property and that the ownership by Electric and Gas is consistent with the proper and economical development of an adequate supply of electrical energy in the territory. Under such circumstances we are bound by the findings of the Commissions approving the sale and purchase as in the public interest." (R-SEC 316)

All the objections are caused by a disgruntled and disappointed would-be purchaser who was not in a position to make anything resembling an unconditional bid for the

property. If this would-be purchaser were a private corporation whose legal power to purchase this property under its charter was in doubt, no one would have dreamed that it would be reasonable for Commonwealth to have jeopardized a most favorable sale in order to wait for an unknown period while that legal question was being litigated. Surely the fact that petitioner was an authority created by the State of South Carolina, entitled it to no special privileges in this respect. Its standing to even raise the question is at least highly doubtful.

POINT I

The United States Circuit Court of Appeals did not decide in this case "an important question of local law in a way probably in conflict with applicable local decisions."

The chief argument by petitioner to bring this case within the provisions of Rule 38(b) of the Rules of this Court is that the court below "has decided an important question of local law in a way probably in conflict with applicable local decisions". The answer is that the issue in this case was not whether, under the law of South Carolina, the Authority had legal power to buy. The issue was whether Commonwealth and the SEC were justified in considering that, under the law of South Carolina, the decisions of its courts and the other facts, there was a substantial doubt as to the legal (and factual) power of the Authority to buy. The decision of the SEC was expressly based not on what the Commission thought would be the final outcome of the question in the courts of South Carolina but on the fact "that there is grave doubt concerning the Authority's ability to acquire the common stock of Power". The court below based its decision on the same reasoning. It said:

> "we agree with the S.E.C. that the decision in the Creech case raises such doubt as to the ability

of the Authority to purchase that its offer should not be considered as ground for invalidating the proposed sale." (R-SEC, p. 313)

The court below then continued:

"As the matter was put up by the S.E.C.:

> 'On the record before us, we are persuaded that there is grave doubt concerning the Authority's ability to acquire the common stock of Power, that a substantial period of time may be necessary to resolve that doubt, and that the real danger to Commonwealth from delay and from an adverse ruling and the fact that there is only one other prospective purchaser in the field, are (fol. 320) sufficient to support Commonwealth's decision to sell to Electric & Gas. It is obvious that the legal questions involved can be determined finally only by the appropriate State Courts, and we do not purport to forecast the probable outcome or the period necessary to obtain a final decision. However, an attempted sale to the Authority might result in long delay and ultimate failure. Such delay would involve cash stringency, in view of the pending construction program of the Commonwealth system. A final determination adverse to the Authority would leave Commonwealth in a substantially impaired bargaining position, and might well result in its inability to procure a satisfactory price for its interest in Power. Under the circumstances, we cannot find that the management's acceptance of the bid of Electric & Gas was unwarranted.'

That the S.E.C. did not over-estimate the obstacle presented by the *Creech* case is perfectly clear." (R-SEC 313)

The court then proceeded to discuss in detail the *Creech* case and to say that in its opinion (as in ours) the *ratio decidendi* of the *Creech* case would prevent the Authority from purchasing the property here in question but the whole discussion of the *Creech* case was merely for the purpose of showing that Commonwealth and the SEC could hardly have reached any conclusion other than the one they did reach, namely, that real and substantial doubt existed as to the legal power of the Authority to purchase. That and that only was the decision of the SEC which the court in its opinion and order confirmed.

This decision is therefore in no respect a holding binding upon the Authority or the taxpayers of South Carolina with respect to the legal power of the Authority to purchase existing utility plants. It is merely a decision that until the South Carolina Supreme Court holds that the opinion in the *Creech* case does not apply to purchases generally there is, to say the least, "grave doubt" as to how that court will decide the question and therefore like doubt as to the existence of power in the Authority to make such purchases.

The fact that such doubt existed and was sufficient to prevent the Authority from consummating such purchases, even before the SEC or court decisions in this matter, is evidenced by the admitted fact that the underwriters to whom the Authority desired to sell securities to finance a purchase by it of Power Company would not agree to purchase such securities until the Authority had obtained a decision establishing its legal power to make such purchase (R-SEC 185). Since this doubt depends upon and can only be removed, if at all, by another decision of the Supreme Court of South Carolina, nothing that this Court could say on this point could be wholly effective to relieve the Authority of the situation created by the opinion in the *Creech* case. That this is so is implicit in petitioner's argument, that the question of its legal power is a question of State law which should have been referred to the State

Courts, a hypothetical course which the SEC fully considered and, in view of the "grave doubt" and uncertainties inherent in it, rejected as too risky.

As to the merits of the conclusions reached on this point by the SEC and the Circuit Court of Appeals, the opinions of the SEC and of the Court amply demonstrate the correctness of their decisions that there was "grave doubt" as to the power of the Authority to consummate a purchase. This is also apparent from a reading of the *Creech* opinion.*

POINT II

The Commissions considered all relevant evidence in authorizing the transaction involved and no important question of Federal law is presented.

No question is raised that the records below are not full and complete or that any relevant testimony was excluded from the record. It is clear from a study of the regulatory acts that the SEC had jurisdiction to consider the propriety of the sale by Commonwealth and the FPC had jurisdiction of the propriety of the purchase by Electric & Gas. It must be remembered that regulatory commissions are not the managers of the property. It is not for them to substitute their judgment in place of the judgment of the directors of the respective companies. The acts are regulatory acts; they are aimed to prevent abuses by

* Petitioner puts great stress on the disposition made by the South Carolina Supreme Court of a petition for rehearing and reconsideration made by the Authority in the *Creech* case. Both opinions below dispose of this contention in detail. It is significant, moreover, that the South Carolina Supreme Court itself attached so little importance to its action on the petition for rehearing and reconsideration that the same is neither reported nor even referred to in the reports of that Court. It is surprising, therefore, to find petitioner still arguing that that Court intended by its disposition of the petition to completely reverse the *ratio decidendi* of its published opinion.

managements. Both commissions, after examining all of the facts, considered that this was a good sale by Commonwealth and a good purchase by Electric & Gas and that there was nothing inconsistent with the public interest in letting the sale go through. As far as the interests of consumers are concerned, it was pointed out that rates charged in South Carolina are subject to regulation by the South Carolina Public Service Commission.

Petitioner seems to feel that the commissions should have used their authority to force Commonwealth, even at the expense of a serious financial risk, to continue for an indefinite period to attempt to consummate the sale to the Authority because in their opinion such a sale would have been *ipso facto* more in the public interest than a sale to Electric & Gas.* We submit that any such theory which

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* The petition and brief are full of statements and arguments designed to show that the record would have supported a finding, if the issue had been reached by any of the commissions considering the matter, that a sale to the Authority would have been more in the public interest than a sale to Electric & Gas. This is denied. There is ample and substantial evidence in the record which would support a finding that a sale to Electric & Gas was more in the public interest than a sale to the Authority, even assuming that such a sale was legally possible. In fact, a very large part of the record before the South Carolina Public Service Commission is devoted to testimony and statements by consumers to that effect. (See R-SCPSC Vol. 3, *passim;* Vol. 4, pp. 11-29; see also Vol. 7, pp. 135-136; Vol. 8, pp. 57, 123). Moreover, the issue is basically the political question of the preferability of public ownership as against private ownership of public utilities. It is submitted that such an issue is not one for decision by an administrative agency as distinguished from the legislature, even should such decision be presented to such an administrative body in a proper case, as it was not here. In any event, it is clear that there is nothing in either the Public Utility Holding Company Act or the Federal Power Act which established the claimed preferability of public power over private power as one of the "public interests" to be forwarded by the commissions in the administration of those Acts.

would lead to the preferring of the Authority over a private company merely because the Authority is a state owned body is completely foreign to the whole substance of regulatory law as it has been developed in this country. We submit that even if the business considerations as between a bid of a private purchaser and of a public authority were relatively equally balanced, there is nothing in either the Public Utility Holding Company Act or the Federal Power Act which would justify the commissions under those acts to attempt to force a sale to either one as against the other. That decision is left by both acts as a function of management and the decision of management, unless detrimental to the public interest, is not to be disturbed. But in this case, in view of the grave doubt of this particular public authority's ability to buy, the business considerations were not at all equal. In the opinion of the management, in which opinion the SEC concurred, the Electric & Gas bid was the more favorable and the price was a good one. That should end the matter in so far as the sale by Commonwealth and the approval by the SEC are concerned.

As for the FPC, it did pass on the public interest involved in the purchase by Electric & Gas. It considered whether Electric & Gas and the Power Company had sufficient facilities to adequately serve the present and future needs of the area. It said, among other things:

> "The systems of the Applicant and the Power Company are interconnected and their operation will be integrated as a result of the stock acquisition. Integration of the properties will permit more efficient and better utilization of existing transmission facilities. Completion of construction initiated by the Power Company will create an additional transmission line so as to enable loop operation between the eastern and western load centers of the integrated properties. Additional operating benefits and economies can flow from the use of the

most efficient steam plants to carry the base load, thereby permitting accumulation of storage in hydro projects to carry peak loads. Integration of the properties will diminish the reserve capacity required to maintain service, as the indicated reserve required for the integrated properties would be practically the same as that for the separate properties independently operated. It is reasonable to conclude that some benefits may be derived from the consummation of the proposed acquisition.

• • •

"In conclusion we *find* that • • •

(2) The acquisition of the common stock of the Power Company upon the terms and conditions proposed, as hereinafter authorized will be consistent with the public interest." (R-FPC 8-9).

It did refuse to go into the hypothetical situation which would have been created had the Authority established its legal right to make the purchase and had the sale to the Authority been authorized by the SEC and had approval then been asked of the FPC of such hypothetical purchase. It was dealing with the issue before it and not on issues which were not before it. There can be no complaint as to that.

Conclusion.

The issues presented in these proceedings are very narrow ones because of the unusual situation and "grave doubt" created as to the legal power of the Authority to purchase the stock of Power Company by the opinion of the Supreme Court of South Carolina in the *Creech* case. Because of that decision the broad issues which petitioner asserts are presented are not reached. The doubt as to

the Authority's legal power to buy would not be removed by a review by this Court of the decisions herein. The petition presents no facts to bring this case within any of the provisions of Rule 38(b) of the Rules and, therefore, the writs should be denied.

Respectfully submitted,

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